United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED OCT 29 1956
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No. 13,472

595

OLIVER W. TOLL,

Appellant

v.

JOHN W. GWYNNE, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Washington, D. C.
EX 3-0625

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed January 26, 1956]

OLIVER W. TOLL
2 Newlands Street
Chevy Chase, Maryland,
Plaintiff,

v.

Civil Action 371-'55

EDWARD F. HOWREY,
JAMES M. MEAD,
LOWELL B. MASON,
JOHN W. GWYNNE,
ROBERT T. SECREST,
Federal Trade Commission,
Washington, D.C.,

ALBERT A. CARRETTA
1116 Ring Building,
1200 - 18th Street, N.W.
Washington, D.C.,

JOHN A. DELANEY
Federal Trade Commission
Washington, D.C.,

PHILIP YOUNG,
GEORGE M. MOORE, and
FREDERICK J. LAWTON,
U.S. Civil Service Commission
Washington, D.C.,
Defendants.

10

COMPLAINT

FIRST: This action is brought to obtain a declaratory judgment establishing Plaintiff's rights as a veteran preference eligible with civil service status, and to obtain a mandatory injunction restoring Plaintiff to Government employment as of the date of his illegal discharge, with the rights flowing from continuity of employment from that date to the date of restoration.

SECOND: The violations by defendants of Plaintiff's rights are of five different types, and Plaintiff accordingly alleges in this Complaint five different claims or causes of action which, although not factually

inconsistent, are in some respects logically in the alternative, as follows:

(1) Denial of comparison of Plaintiff's retention rights with those of employees in other "competitive levels". Plaintiff's first claim is that —(even on the hypothesis that in this case there was basis for a reduction in force, —which Plaintiff does not concede)— the regulations of the Civil Service Commission under the Veterans Preference Act of 1944 are, in respect of certain provisions relating to the comparison of the retention rights among the various employees of the discharging agency, contrary to the mandate of said statute, illegal and void; and the application of such illegal provisions to Plaintiff's case has resulted in a separation of Plaintiff from his civil service employment which is erroneous, illegal and void.

(2) Evasion of Plaintiff's retention rights by the creation of a multitude of "competitive levels". The Plaintiff's second claim—(again on the aforesaid hypothesis)—is that, utilizing provisions of said regulations
11 which permit the comparison of the respective retention rights of employees to be restricted primarily or wholly to the consideration thereof merely within certain groups ("competitive levels"), the Federal Trade Commission subdivided its employee personnel for purposes of the reduction in force into such a multitude of fragmentary units as to eliminate any effective application of the statutory requirements as to the Plaintiff; and that Plaintiff's separation from employment by such means was contrary to the mandate of the statute, illegal and void.

(3) Denial to Plaintiff of substantial procedural rights. Plaintiff's third claim is that—(even on the aforesaid hypothesis)—the Federal statutes, and in particular the Veterans Preference Act, vest in a preference eligible civil service employee certain substantial procedural rights in appealing his dismissal under reduction in force proceedings, and that the denial to the Plaintiff of said rights in the instant case rendered Plaintiffs discharge illegal and void.

(4) The reduction in force a sham proceeding. Plaintiff's fourth claim is that--(contrary to the aforesaid hypothesis)—in the instant case

there was no valid or legal basis for the use of reduction in force proceedings, but such proceedings in the instant case were colorable only, a deliberate evasion of the merit system and of Plaintiff's rights, and in their entirety illegal and void, and Plaintiff's discharge thereunder was likewise illegal and void.

12 (5) Denial of Plaintiff's reemployment rights. Plaintiff's fifth claim is that (even on the hypothesis that none of the aforesaid claims are sustained) the Veterans Preference Act vests in Plaintiff, as a veterans preference eligible civil service employee with civil service status, rights of reemployment which have been illegally denied to the Plaintiff; and by reason thereof Plaintiff should be restored to employment on the basis of such reemployment rights.

I. For a First Claim and Cause of Action

(Denial of comparison of Plaintiff's retention rights with those of employees in other "competitive levels".)

THIRD: There exists between Plaintiff and the Defendants herein an actual controversy. The matter in controversy arises under the laws of the United States, and involves a matter in controversy which exceeds the sum or value of $3,000.00, exclusive of interest and costs. This action is brought to obtain a declaratory judgment and equitable relief, as hereinbefore in paragraph "First" hereof and hereinafter more fully set forth.

FOURTH: The jurisdiction of the Court in this matter arises under Sections 11-301, 11-305, 11-306 and 11-325 of the District of Columbia code; Sections 1331, 2201 and 2202 of Title 28 of the United States code, and Section 1009 of Title 5 of the United States Code.

FIFTH: The Plaintiff is a citizen of the United States and of the State of Colorado, and at the present time is a resident of the State of Maryland.

13 SIXTH: Defendants Edward F. Howrey, James M. Mead, Lowell B. Mason, John W. Gwynn and Robert T. Secrest are at the present time Commissioners of the Federal Trade Commission, and constitute the entire board of said Commission. Defendant John A. Delaney is the

Director of Personnel of the Federal Trade Commission. Defendants Philip Young, George M. Moore and Frederick J. Lawton are Commissioners of the United States Civil Service Commission, and constitute the entire board of said Commission. Each of said defendants, except Robert T. Secrest, occupied, in September and October, 1953, the same official position now occupied by him. Defendant Albert A. Carretta was a Commissioner of the Federal Trade Commission in September and October, 1953; subsequent to 1953 his term as such Commissioner expired, and he was replaced by said Robert T. Secrest. Said defendants are sued in their official capacities and personally. Each of said defendants has his official station or office in the District of Columbia and is to be found therein.

SEVENTH: This action is brought for violations by the defendants, in the manner and fashion hereinafter set forth, of the civil service laws of the United States, including the following statutory provisions concerning the rights of veterans in the Federal civil service:

(1) The civil service act of 1883, as amended (Title 5, U.S. code, 632, et seq.)

(2) The Veterans Preference Act of 1944, as amended, and in particular Sections 2, 12 and 14 thereof, (Secs. 831, 861 and 863, Title 5 United States Code).

(3) The Classification Act of 1949, c. 782, Title 11, Section 1104 (Sec. 1075, Title 5, United States Code).

EIGHTH: The Plaintiff served in the active Naval Service of the United States during the period of World War I, to-wit, from January 3,
14 1918, to March 19, 1919, and was honorably discharged therefrom; and at all times during his Government employment after 1944 as hereinafter set forth Plaintiff was, and now is, a veterans preference eligible within the meaning of the Veterans Preference Act.

NINTH: The Plaintiff is a government civil service career employee. Plaintiff entered government employment more than twenty years ago, serving in the Department of Agriculture in various attorney capacities from March 21, 1934, continuously until February 26, 1937. On the

latter date, Plaintiff transferred to the Bureau of Internal Revenue and served continuously therein in various attorney capacities to and including February 24, 1944. Subsequently, Plaintiff served as a civilian employee of the War Department, serving continuously in various legal capacities for said Department from April 19, 1946, to and including January 27, 1949. Subsequently, Plaintiff was employed and served on the staff of the Federal Trade Commission in various attorney capacities, serving continuously from June 11, 1951, until illegally and unlawfully discharged, as hereinafter set forth, on October 9, 1953. At the latter time Plaintiff was employed under the title of "Attorney-Advisor", with the rank and grade of GS-11, at a salary of $6,140.00 per annum.

TENTH: In the latter part of 1942, Plaintiff was examined by the Board of Legal Examiners, appointed to determine the qualifications of certain persons to serve and hold permanent appointments as attorneys in the Federal civil service, and was found by said Board to be qualified to act in such capacity at the rank or grade of P-6, which is equivalent to the present rank and grade of GS-13. Pursuant to such examination and determination, and under the provisions of the Ramspect Act and Executive Order 8743, on or about November 19, 1942, Plaintiff duly acquired a permanent civil service status as a United States civil service employee in the classified civil service, and ever since November 19, 1942, has been and now is possessed of permanent civil service status.
15 Prior to his employment by the Federal Trade Commission, Plaintiff was examined by a board established by said Commission to pass upon the qualifications of applicants for attorney positions on the staff of said Commission. Plaintiff's qualifications having been approved by said board, Plaintiff's name was placed upon the register maintained by said Commission from which appointments to the legal staff of the Commission were duly and regularly made in order of merit; and Plaintiff's employment on the staff of the Federal Trade Commission was duly and regularly made from said register on the basis of merit and on the basis of his qualifications as attorney, both as determined in connection with his acquisition of permanent civil service status and as determined by said

board appointment by the Federal Trade Commission. Neither of said determinations were restricted to any single type or field of legal work; and in fact Plaintiff's experience and qualifications cover a wide range. The register maintained by the Federal Trade Commission applied generally to all attorney positions on said Commission's staff of the particular rank or grade in question without distinction as between the different branches, bureaus, sections or activities, and the entry of Plaintiff's name therein signified the determination of Plaintiff's qualifications generally for any attorney position on the staff of the Commission at the rank or grade of GS-11 or below. In September and October, 1953, Plaintiff was, and now is, fully qualified to perform the functions of any such position on the staff of said Commission without interruption in efficiency of operation or interference with the work of the Commission.

ELEVENTH: By reason of Plaintiff's military service and Government civil service employment as aforesaid, the Plaintiff in September and October, 1953, was entitled to veteran's preference under the statutes referred to in paragraph "Fifth" herein, and was entitled to a credit of at least 16 points under the rules of the Civil Service Commission relating to reductions in force. At the time of Plaintiff's discharge from employment by the Federal Trade Commission, as hereinafter set forth,
16 Plaintiff was rated "satisfactory", which for the purposes of the requirements of the Veterans Preference Act of June 27, 1944, as amended, is equivalent to the rating of "good" or better under the system of rating in effect at the time of the passage of the Veterans Preference Act of 1944.

TWELFTH: On September 8, 1953, while Plaintiff was attorney under civil service employment by the Federal Trade Commission, as aforesaid, and possessed of permanent civil service status, as aforesaid, and a preference eligible within the meaning of that term as used in the Veterans Preference Act of June 27, 1944, as amended, Plaintiff was notified by defendant John A. Delaney, as Director of Personnel of the Federal Trade Commission, that due to a reduction in force in said Federal Trade Commission, Plaintiff would be separated from his job

position in said Federal Trade Commission; and on October 9, 1953, under such purported reduction in force proceedings, and without any delinquency or misconduct on the part of the Plaintiff, Plaintiff was in fact so separated and discharged from his said civil service position. Plaintiff has at no time been reinstated in such position or reassigned to a comparable or any position by the defendants herein, although due demand has been made therefor by the Plaintiff. Plaintiff has at all times been ready, willing and able so to serve.

THIRTEENTH: In September and October, 1953, when Plaintiff was separated from employment, Plaintiff was serving in the same Bureau, Division and Section of the Federal Trade Commission as that in which Kenneth L. Sloan and Lynn M. Hubler were employed and was engaged in work of the same general character, although Plaintiff occupied a position with the grade GS-11 and said Sloan and Hubler occupied lower positions with the grade GS-9. Plaintiff and said Sloan and Hubler had been classified, under the reduction in force proceedings, as in the same so-called "competitive area", but (solely by reason of the differences in
17 their grades) as in different so-called "competitive levels". Plaintiff was fully qualified to fill either of the positions occupied by said Sloan and Hubler and to perform the functions of said positions without interruption to the work program. Said Sloan and Hubler, like the Plaintiff, had been classified as holding so-called "excepted" positions and as employed under so-called "indefinite" appointments. Said Sloan and Hubler were, like the Plaintiff, veterans within the Terms of the Veterans Preference Act. However, said Sloan and Hubler were not (like the Plaintiff) possessed of civil service status. Moreover, said Sloan and Hubler had lesser rights of retention in employment, under the criteria established by the Veterans Preference Act, than those of the Plaintiff; whereas the Plaintiff was entitled to at least 16 "retention credits" (by virtue of years of Government service), said Kenneth L. Sloan was entitled to only 14 "retention credits", and said Lynn M. Hubler was entitled to only 7 "retention credits". Said Sloan and Hubler were not separated from their employment under the reduction in force proceedings, but have been continued in their

employment continuously to the present time. Plaintiff duly protested his own separation from employment while said Sloan and Hubler, with lesser retention rights, were retained in positions which Plaintiff was qualified to fill without interruption with the work of the agency.

FOURTEENTH: Defendants cite Section 20.5(b) (2) of the Federal Personnel Manual, which reads as follows:

> "No employee in any subgroup of the career group or the career-conditional group who is willing to accept a reasonable change in position may be separated, furloughed for more than 30 days, or subjected to greater reduction in pay then necessary under such reasonable change in position, if he is qualified for a continuing position in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained, or if he is qualified to go back to a continuing position from which he was promoted (or to an essentially identical position) in his present competitive area in which an employee with lower retention standing is retained." (Underscoring supplied).

Under Section 20.4 (c) (3) of the Federal Personnel Manual, Plaintiff and said Sloan and Hubler had all been classified as in group "III", Subgroup "A". Under the provisions of Section 20.5(b)(2), quoted above, Plaintiff was denied the right to have his retention rights compared to those of said Sloan and Hubler, or to accept a change to either of their positions, upon two grounds:

(1) One ground asserted for denying application of Section 20.5(b) (2) to the Plaintiff is that the word "subgroup" (underscored in said provision as quoted above) as it occurs in the phrase "with lower subgroup standing" is construed to restrict the provisions of Section 20.5(b)(2) to cases in which the employee retained in employment is in a lower subgroup than that of the employee being separated (i.e., to cases in which the employee being separated has veteran preference and the other employee does not).

(2) The other ground asserted for denying application of Section 20.5 (b)(2) to the Plaintiff is that the phrase "of the career group or the career-

conditional group" (underscored in said provision as quoted above) is construed to restrict the provisions of Section 20.5 (b) (2) to cases in which the employee being separated from employment is in tenure group "I" or "II", and to deny application of the section in cases in which the employee being separated is in tenure group "III",

FIFTEENTH: The right of an employee separated from employment to have his retention rights compared with those of other employees in different but comparable "competitive levels" is a right accorded by the statute, else Section 20.5 (b)(2) would be a gross violation on the part of the Civil Service Commission of the rights of the employees displaced ("bumped") by virtue of it.

(1) It is wholly capricious for the Civil Service Commission by inserting the word "subgroup" in Section 20.5 (b) (2) as aforesaid, to decree that one of the statutory criteria (viz., veteran preference) for determining retention rights shall be considered as between employees in different but comparable "competitive levels", but that another statutory criterion (viz., years of Government Service) shall be ignored, although, as in the instant case, there is nothing to offset the clear superiority in retention rights given by that criterion.

(2) It is wholly capricious for the Civil Service Commission to provide that superior retention rights may be given effect as between employees in different but comparable "competitive levels" in favor of employees in tenure groups "I" and "II", but shall be ignored when possessed by employees in tenure group "III". Employees in group "III" are admittedly entitled to have effect given to their retention rights, and there is no power in the Civil Service Commission arbitrarily to withhold what the statute gives.

Plaintiff alleges that the words in Section 20.5 (b) (2) of the Federal Personnel Manual which are underscored in the passage as quoted in paragraph "fourteenth" herein are, as construed by Defendants, arbitrary, capricious and unreasonable, and are null and void, and that said Section should be given effect free of said unlawful restrictions.

20 SIXTEENTH: After the institution of the proceedings to separate the Plaintiff from his employment as aforesaid, Plaintiff duly appealed such action to the Civil ServiceCommission. A decision adverse to the Plaintiff was made by E.A. Dunton, Chief, Appeals Examining Office, Civil Service Commission, under date of April 9, 1954. Plaintiff duly appealed therefrom to the Commissioners of the Civil Service Commission, and after certain interim proceedings Plaintiff was for the first time advised by John E. Blann, Chairman, Board of Appeals and Review of the Civil Service Commission, by letter, mailed November 18, 1954, that the Commission had rendered a final decision adverse to the Plaintiff with respect to his appeal. Plaintiff has exhausted his administrative remedies and has no other or adequate remedy against the illegal acts and conduct of the defendants, save the equity powers of this Court.

II. For a Further and Second Claim and Cause of Action.

(Evasion of Plaintiff's retention rights by the creation of a multitude of "competitive levels").

SEVENTEENTH: Plaintiff repeats and realleges the allegations contained in paragraphs "Third" through "Sixteenth" hereinabove with the same force and effect as if set forth at length herein.

EIGHTEENTH: Section 12 of the Veterans Preference Act provides:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * Provided further, that preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings * * *."

21 NINETEENTH: Section 20.4 (d) (2) of the Federal Personnel Manual provides:

"Separate registers shall be compiled to show the distinctions between competitive levels representing positions in the competitive service; excepted from the competitive service; and those filled on a seasonal, when-actually-employed (WAE), or part-time basis."

Under the regulations and practices of the Civil Service Commission the distinction between so-called "competitive" and so-called "excepted" positions is used as a basis for declining, in a reduction in force proceeding, to compare the respective retention rights under the Veterans Preference Act as between employees in the one category of positions and employees in the other. Plaintiff alleges that such use of said distinction is without any reasonable basis or excuse, is a material curtailment of the application of the statutory criteria, contrary to the mandate of the Veterans Preference Act, and is illegal and void.

TWENTIETH: Section 20.4 of the Federal Personnel Manual authorizes an agency conducting a reduction in force to establish a plan of so-called "competitive areas". Under the regulations and practice of the Civil Service Commission such so-called "competitive areas" may be used as the basis for declining to apply the statutory criteria prescribed by the Veterans Preference Act as the basis for determining employees' respective retention rights as between employees placed in different so-called "competitive areas". Plaintiff alleges that such distinction between so called "competitive areas" is not a proper or reasonable basis for declining to compare the respective retention rights as between employees in one so-called "competitive area" and employees in another; and that the use of such device in the instant case is illegal and void, and has illegally deprived Plaintiff of his rights under said statute.

22 TWENTY-FIRST: Section 20.4 (2) (b) of the Federal Personnel Manual provides:

"Within the competitive area the agency will determine competitive levels of positions to be affected by a reduction in force."

Section 20.2 (f) of the Federal Personnel Manual provides:

> "'Competitive level' means all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Generally such positions will be in the same grade or occupational level, but this is not necessary if the other tests are met.)"

Plaintiff alleges that in the instant case the Federal Trade Commission, and in particular defendant John A. Delaney, devised in the reduction in force proceedings a multitude of different so-called "competitive levels". On information and belief Plaintiff alleges that the number of "competitive levels" thus devised exceeded one hundred. Said "levels" failed to conform to provisions of Section 20.2 (f) of the Federal Personnel Manual, in that they failed to contain in such "levels" the names of all employees whose services could be readily interchanged without undue interruption to the work program. The fragmentation of the employee personnel into many small "levels", made as aforesaid, was made in bad faith and with the purpose and result of defeating the rights of Plaintiff and others under the Veterans Preference Act.

III. For a Further and Third Claim and Cause of Action:

(Denial to Plaintiff of substantial procedural rights)

TWENTY-SECOND: Plaintiff repeats and realleges the allegations contained in paragraphs "Third" through "Twenty-First" hereinabove with the same force and effect as if set forth at length herein.

23 TWENTY-THIRD: Section 20.4 (d) (3) of the "Retention Preference Regulations" provides:

> "Employees notified of proposed adverse action in reduction in force, shall have an opportunity to examine registers and other records which have bearing on the actions in their cases."

It is only by examination and study of the retention register that an employee may ascertain what various "competitive levels" have been created, and which employees have been placed in each; that he may check as to whether all employees of the agency have in fact been included in the reduction in force proceedings and their respective retention rights correctly set forth, whether the "competitive levels" have been

correctly formed, and whether in selecting employees for discharge the provisions of the statute and regulations have been followed. Such right of inspection is substantial and vital. Plaintiff was refused the right to examine the retention register prepared in connection with the purported reduction in force proceedings carried out in his case, although such examination was repeatedly demanded by Plaintiff. By reason of such refusal Plaintiff has been denied a substantial procedural right to which in any reduction in force proceeding (whether bona fide or sham) Plaintiff was entitled; and by reason thereof the Plaintiff's separation from employment was and is illegal and void.

TWENTY-FOURTH: Section 20.9 of the "Retention Preference Regulations" promulgated under the Veterans Preference Act of 1944 provides that an employee notified of proposed action in a reduction in force may appeal to the Civil Service Commission. Plaintiff alleges that said provision vests in an employee separated from Government employment under purported reduction in force proceedings the right to a fair, unbiased, reasonable and at least semi-judicial hearing. Plaintiff alleges that in his appeal to the Civil Service Commission the hearing was Star Chamber in character. No transcript was kept of the
24 proceedings, although requested by Plaintiff, and, over Plaintiff's protests, a shorthand reporter who attended at Plaintiff's request for the purpose of making a transcript of the proceedings was excluded. The persons presiding at the hearing relied upon a report, apparently adverse to Plaintiff, which Plaintiff was not permitted to examine. The general public and friends of Plaintiff were excluded from the hearing, and a decision was made by a person, E.A. Dunton, who was not present at the hearing, and who had theretofore evidenced bias against the Plaintiff. Plaintiff alleges on information and belief that said Dunton had theretofore participated in and approved some or all of the steps taken in the purported reduction in force proceedings, and had accordingly prejudged certain material issues raised by Plaintiff in said hearing, and that said Dunton was the official superior of the employee who had rendered the report taken in evidence at said hearing, and which Plaintiff

was not permitted to examine.

TWENTY-FIFTH: Great and unreasonable secrecy prevails as to many aspects of the hearings held by the Civil Service Commission in reduction in force cases. It has not been possible for Plaintiff to ascertain what appeals have been filed in reduction in force cases, nor how many, nor what decisions have been reached therein, nor the grounds upon which decisions have been made. Plaintiff is informed and believes, and so alleges, that the secrecy which shrouds such hearings has been established in order to facilitate the rendering of arbitrary, capricious and unreasonable decisions in such cases, and to prevent their public exposure. By reason of the absence of a fair and unbiased tribunal to which Plaintiff could appeal his separation from employment and the absence of proper appeal procedures, Plaintiff's separation from employment was and is illegal and void.

IV. For a Further and Fourth Claim and Cause of Action (The reduction in force a sham proceeding).

TWENTY-SIXTH: Plaintiff repeats and realleges the allegations contained in paragraphs "Third" through "Twenty-Fifth" hereinabove with the same force and effect as if set forth at length herein.

TWENTY-SEVENTH: As Plaintiff is informed and believes and so alleges: Notwithstanding the fact that the budget for the Federal Trade Commission for the ensuing fiscal year had been slightly reduced, there was in September and October, 1953, no necessity for a reduction in the force of the staff of the Commission. The reason assigned for the purported reduction in force, —"Due to severe budget curtailment it has become necessary for the Federal Trade Commission to reduce its staff"—did not actually exist and was without justification. The principal purpose and object of conducting the purported reduction in force proceedings in the instant case was to create vacancies on the staff of the Commission which could later be filled. To effectuate that purpose it appeared desirable to make a change as to the person holding the office of Director of Personnel. The manner in which that change was made throws light on the purposes and policies of defendants in the

purported reduction in force. The proceedings were so arranged as to render it possible to pin-point the employees desired to be reached. A list was prepared of the names of persons desired to be reached in said purported reduction in force proceedings, and said proceedings were thereafter framed with a view to reaching the persons named on said list. The proceedings were also used to eliminate from the staff of the Commission individuals and groups who had been particularly aggressive and effective in their efforts to secure strict enforcement of the anti-monopoly and antitrust laws. By reason of the foregoing said purported reduction in force proceedings were sham and illegal in their entirety, and Plaintiff's separation from employment thereunder was illegal and void.

26 TWENTY-EIGHTH: Defendants do not have an absolute discretion in the matter of employment of civilian personnel but are subject to the provisions of law relating to the merit system and to veterans preference. Such provisions not only protect the public but also establish in a civil service employee rights of property and security. The utilization by defendants of a purported reduction in force procedure, as aforesaid, in the absence of such grounds of shortage of funds or curtailment of function as actually necessitated a bona fide reduction in force, constitutes an evasion and violation of the laws enacted for the maintenance of the merit system in the civil service and of the rights of the employees, including Plaintiff, thereby separated from employment. Constitutional protection extends to a public servant excluded from Government employment by acts of administrative officials which are arbitrary, discriminatory and illegal. Plaintiff specially sets up and claims his rights to due process of law under the Fifth Amendment of the Constitution of the United States in support of his right to retention of his Government employment as aforesaid, and alleges that his rights to such due process of law have been violated by the acts of the defendants as hereinabove set forth.

V. <u>For a Further and Fifth Claim and Cause of Action</u> (Denial of Plaintiff's reemployment rights).

TWENTY-NINTH: Plaintiff repeats and realleges the allegations contained in paragraphs "Third" through "Twenty-Eighth" hereinabove with the same force and effect as if set forth at length herein.

THIRTIETH: Plaintiff has made due and timely demand upon defendants to be reemployed on the staff of the Federal Trade Commission,
27 and that his name be placed on any and all reemployment lists maintained for any attorney positions with said Commission. Plaintiff has made due and timely request of the Civil Service Commission that his name be placed upon all appropriate registers or lists of eligibles for all attorney positions for which his qualifications have been established, as hereinbefore in paragraph "Eighth" hereof alleged. On information and belief Plaintiff alleges that since Plaintiff was separated from his employment on October 8, 1953, and subsequent to said demands and requests by Plaintiff, defendants have appointed and employed other persons having lesser rights to employment according to the criteria of the Veterans Preference Act of 1944, as amended, than those of the Plaintiff, and that such appointments have been made in violation of the provisions of Sections 8 and 15 of the Veterans Preference Act of 1944, as amended. On information and belief, Plaintiff further alleges that defendants herein are now cooperating in a program which improperly and illegally incorporates persons other than Government officials in the channels required for approval of new Federal civil service employment and renders it highly improbable if not impossible for Plaintiff to be reemployed.

WHEREFORE, Plaintiff prays for the following relief:

I. That the Court enter a declaratory judgment in this case fixing and determining the rights of the Plaintiff as a veteran preference eligible in Government civil service employment, and that the Court determine that Plaintiff's separation from employment under the reduction in force proceedings conducted by defendants herein was illegal and void; and that the judgment of the Court shall declare and establish Plaintiff's right to be restored to Government civil service employment in the Federal Trade Commission as of October 8, 1953, in the same rank and grade occupied by Plaintiff at the time of his illegal

discharge, and that a mandatory injunction issue directing and requir-
28 ing the defendants to restore Plaintiff to his said proper position and grade on the staff of said Federal Trade Commission as of the date of his illegal discharge, together with all rights, benefits and privileges, including salary, flowing from a continuity of service from that date to the date of his restoration.

II. Or, in the alternative to the relief prayed for in the preceding paragraph "I", and in the event only that the Court shall deny such restoration of the Plaintiff to employment as of October 8, 1953, that the judgment of the Court shall declare and establish Plaintiff's right to be restored to Government civil service employment as of such date, in such position and on such terms as the Court may determine to be right and proper, and that a mandatory injunction issue directing and requiring defendants to restore Plaintiff to such employment in accordance with such rights.

III. For such other, further and different relief as this Court may deem proper in the premises.

/s/ OLIVER W. TOLL, Plaintiff
Rm. 511 - 777 14th St. N.W.
Washington, D.C.

29 DISTRICT OF COLUMBIA: SS

Oliver W. Toll, being first duly sworn, on his oath deposes and says that he has read the foregoing complaint by him subscribed and knows the contents thereof, and that the matters and things therein stated he verily believes to be true.

/s/ OLIVER W. TOLL

Subscribed and sworn to before me this 26th day of January, 1955.

HARRY M. HULL, Clerk

By H.B. Dertzbaugh, Deputy Clerk (sgd)

30 [Filed February 15, 1955]

MOTION TO DISMISS

Come now the defendants by their attorney, the United States Attorney, and move this Court for an order dismissing the above-entitled complaint as to defendant Albert A. Carretta for the following reasons:

1. This Court lacks jurisdiction because between plaintiff Toll and defendant Carretta there is no justiciable issue or case in controversy.

2. As to defendant Carretta, the complaint fails to state a claim upon which relief may be granted.

/S/ LEO A. ROVER, U.S. Atty.
/s/ FRANK H. STRICKLER
/s/ JOSEPH M. F. RYAN, JR.
Assistant U.S. Attorneys

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43 [Filed March 2, 1955]

PRAECIPE

The Clerk of said Court will hereafter note change of address for plaintiff from Room 511-777 14th St., N.W., Washington, D.C. to 2 Newlands Street, Chevy Chase 15, Maryland.

/s/ OLIVER W. TOLL,
2 Newlands Street,
Chevy Chase, Md., Pro Se

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44 [Filed March 3, 1955]

ORDER

Upon consideration of defendants' motion to dismiss the complaint as to defendant Albert A. Carretta and plaintiff's opposition thereto, and it appearing to the Court that Albert A. Carretta is not a proper party defendant, it is by the Court this 3rd day of March, 1955,

ORDERED, That the complaint, insofar as it relates to Albert A. Carretta, be and it is hereby dismissed.

/s/ R. B. KEECH, Judge

57 [Filed January 6, 1956]

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND FOR SUBSTITUTION OF CERTAIN PARTIES DEFENDANT

Plaintiff moves for an Order permitting him to file his Supplemental Complaint in this action, and to substitute as defendants in this action William C. Kern and Sigurd Anderson as successors in office, respectively, of defendants Edward F. Howrey and James M. Mead.

A copy of plaintiff's proposed Supplemental Complaint is attached hereto.

/s/ OLIVER W. TOLL
Plaintiff, Pro Se.

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60 [Filed January 9, 1956]

ORDER

Upon reading plaintiff's Motion to File Supplemental Complaint and for Substitution of Certain Parties Defendant, and it being satisfactorily shown to the Court that there is substantial need for continuing and maintaining this action and obtaining an adjudication of the questions involved therein,

LEAVE is granted to plaintiff to file his Supplemental Complaint. It is further

ORDERED that William C. Kern and Sigurd Anderson, personally and in their official capacities, be substituted in the place and stead of Edward F. Howrey and James M. Mead as defendants in this action, and that this action may be continued and maintained against said defendants William C. Kern and Sigurd Anderson as well as against the other defendants not superseded in office.

/s/ CHARLES F. McLAUGHLIN
Judge

[Supplemental complaint was filed January 10, 1956]

781 **CONDENSED STATEMENT IN NARRATIVE FORM OF THE TESTIMONY OF JOHN A. DELANEY, GIVEN DECEMBER 22, 1955, IN THE FORENOON, BEFORE ELIZABETH GUHRING, NOTARY PUBLIC.**

My name is John A. Delaney, * * * my business address Federal Trade Commission. * * * I occupy the position of Director of Personnel. The Federal Trade Commission is headed by * * * five Commissioners. The Chairman is responsible for administration. Under him there is an Executive Director to whom is delegated administrative responsibilities. As Personnel Director, I report to the Executive Director of the Federal Trade Commission. * * *

I went on the payroll of the FTC August 26, 1953. Prior to that, I had been with the FTC from August 10, 1953, to August 26, on a reimbursable detail from RFC. When I came to the FTC on August 10, 1953, I would say I expected to occupy the position of Director of Per-
782 sonnel. * * * My position requires extensive knowledge of the operations of the Personnel Division. * * * I am responsible for the classifications of the positions, recruitment and placement of different employees, conducting reductions in force * * * and the maintenance of our records regarding personnel. I am responsible for conducting liaison with the Civil Service Commission * * * unless * * * taken up with a higher level. The higher level would be Executive Director; Commissioners. * * * When I came on the payroll of the FTC, the Execu-
783 tive Director was Mr. Parrish. * * * I was employed by the RFC during the period August, 1946, through August, 1953. For most of that period of time I had charge of reductions in force there. * * * I would estimate that I got out in the neighborhood of 2,000 reduction in force notices. I don't know of anyone who has had more experience in that field than myself.

This reduction in force in which the plaintiff is one of the parties reduced was a broad proceeding involving many people, and not all of the notices were issued on the same day.

Q. But they were all issued under an alleged necessity to reduce the payroll, is not that correct? A. That is correct.

* * * I established the retention registers and issued reduction in force notices based on the recommendations of higher officials on the competitive levels which people should be reduced in. * * * There
784 are memoranda in regard to the RIF. I can't even guess how many memoranda I wrote on the subject. * * * Copies of those memoranda would be in my office. * * * I received memoranda on the general subject. I can only remember about two. It is possible I might have received more. Not many more. * * * They are in my office. * * *

785 In establishing a retention register, it is necessary to define the extent of the competitive areas. In most instances, a competitive area is determined by geography, or by the fact that a particular group of functions is so unrelated to the other functions of the agency that they can be segregated into a separate competitive area. Then it is necessary to determine the interchangeability of the work of positions, and segregate positions where the work would be interchangeable, so that they would be in one series of competitive levels, series being determine by grade level . * * * Interchangeability of position is a question of fact, and of fact and opinion, opinion as to whether one kind of work would be interchangeable with another. It never depended on the people involved.

There have been transfers in the FTC apart from this particular reduction in force. * * * I would say that almost every employee in FTC had been transferred at some time or another. There would have
786 been quite a few from one line of work to another, I am sure. * * * When attorney positions are filled by employees coming in at the FTC, they are taken from a common list of eligible attorneys. When a question arises as to transferring a man, the necessity of his being able to handle the new work arises, definitely.

Q. Do I understand that the question of interchangeability of positions is a problem that arises only in reductions in force. A. That is absolutely correct.

THE WITNESS:

A. * * * Each Bureau was given a certain quota they had to meet. It was discussed with me where they were going to cut -- grades 9 or 11, for example -- and whether they were going to meet their dollar requirements. The question as to which level, and which Bureau
787 was to cut so many people was discussed with me. * * * In determining which positions would be cut, the officials concerned would want to know how the employee stood on the retention register, and which employees were in what positions. They knew which employees would be going. We held meetings, with each Bureau Director meeting Mr. Parrish and myself. We had to supply them with the information. We would do it almost in terms of names. * * * In all instances the Bureau Director, though, was the one who made the final decision as to where the cuts would come. * * *

788 * * * These conferences where they selected men to be cut occurred after the retention registers were prepared. They had knowledge of the retention registers involving the employees and their organizations. * * * If an individual were in the excepted service, his competitive rights would be limited to one competitive level, which was based upon his kind of work and his grade. Therefore, if such an individual were selected for reduction in force, he would have no bumping rights. However, an individual in the competitive service with veterans' preference and status might have bumping rights over the incumbents of many other positions.

Q. How many retention registers did you prepare for the reduction in force in question? A. I prepared one.

Q. Only one? A. Only one.

789 Q. And that retention register embraced what? A. All of the positions in the FTC.

* * * The term "retention register" means the establishment of a register including all positions affected by a reduction in force. * * * The reduction in force of which we are speaking was one in which only attorney and semi-legal positions were affected. * * * Bumping rights

do not enter into the question of interchangeability. * * * Competitive levels are established on the basis of interchangeability of positions and grade level. Bumping rights are the individual's rights to another posi-
790 tion outside of his competitive level, and are determined by his status, his length of service, and his veterans' preference; and as to what other positions he might have occupied. * * * It isn't a question there of interchangeability, it is a question of minimum basic qualifications, whether a person could do the job at all. * * *

791 I think the decision to conduct the reduction in force was made long before I arrived at FTC. When I arrived the problem was under discussion, and I immediately went to work establishing the register. * * * As specifically how I knew, that was the only thing anyone in the Commission talked about at that time. * * *

792 I did not decide the general scope and character of the cut. I cannot tell you from whom I received instructions about that. I knew the size of the budget cut. Now who determined the scope? The various parts of the Commission. I cannot tell you who determined the general scope. It would have to be somebody in the top management. On final analysis it would have to be the Chairman's decision. * * * I don't think it would be an absolutely correct statement to say that Mr. Parrish, who was the Executive Director, and my supervisor, gave me all directions as to the scope. However, I am certain that he had the knowledge and could have given me such directions. * * *

793 I spoke of the reductions in force being proportionalized. My understanding is that decision was made by the Commissioners. That is the only part they played in the reduction in force process. * * *

794 Q. You were requested to bring certain papers. * * * I also asked for the FTC register for attorney positions. Do you have that here?
A. I have that here.

Q. May I see that?

Mr. Ryan: Mr. Toll, the policy of the FTC is to permit persons involved to see that portion of the retention register which pertains to them.

Mr. Toll: May I interrupt? The subpoena called for the employment register, which I think is quite different.

795 Mr. Ryan: There is such a thing as a register for attorney positions in relation to employment, but you did not specify which register, so we brought the retention register. We thought it most concerned with your case. The subpoena was not clear. * * *

/s/ JOHN A. DELANEY

[Certificate of Notary]

796

CONDENSED STATEMENT IN NARRATIVE FORM OF THE TESTIMONY OF JOHN A. DELANEY, AS CONTINUED ON DECEMBER 22, 1955, IN THE AFTERNOON, BEFORE D. F. KING, NOTARY PUBLIC

Q. Mr. Delaney, I notice in this personnel folder there is a mimeographed sheet bearing certain pencil notations headed "Toll, Oliver W., April 6, 1951, GS-11", and it concludes with the figure "93.5". Would you tell me what that document is? A. I would assume that it is a rating paper wherein the plaintiff was given a rating on an attorney register of 93.5 for employment with Federal Trade. * * * I would assume that this is the paper which determines the score which is received for purposes of rating on the Federal Trade Commission employment register. I don't know of my own knowledge. I have the custody of those papers. * * *

797 As to the procedure for maintaining an employment register at the Federal Trade Commission: * * * Numerical ratings are assigned to the applications. They are placed on a register, on the basis of the one having the highest rating at the top, on down to the person who has the lowest rating at that time. They are put on the registers by grade level to which they appear to be qualified, or which they indicate they will accept, with particular salary. All grade levels are separated. * * * The employment register is kept on -- what size is it - - letter size sheets of paper. There is a covering sheet showing register of attorneys,

798 and the date on which it was prepared. * * * The rating is shown on that master sheet, so that the employment register gives the names and the ratings for each man.

Q. Is this the same system that was formerly in use, say, in 1951? A. I cannot be sure that it was the same system. * * *

Mr. Ryan: * * * this entire line of questioning about the procedures for setting up a retention register or retention employment register is immaterial and irrelevant to the issues of the case. In addition I should like to add another objection, * * * Mr. Delaney has stated * * * he was not there at the Commission, was not aware of what the procedures were, but is just testifying from the appearance of a file over which he now has custody. * * * He can testify that this is the file of Mr. Toll, and he can testify that these are documents that are in the file, but as to what those documents represent, he is not a competent witness. I suggest that the person who prepared a document would be the only competent witness.

799 The Witness. * * * The board which gives the ratings * * * is called the Legal Review Board. The members of that board since I have been at the Federal Trade Commission have been General Counsel, Mr. Earl Kintner; Mr. Alex Akerman, the Executive Director; Mr. Robert Parrish, the Secretary of the Federal Trade Commission; and myself, John A. Delaney. * * * I believe there was a document that appointed those gentlemen to the Board. * * * I wouldn't know who would have custody of it. Likely the Secretary of the Commission. * * *

800 I don't know whether or not in plaintiff's case there has been any re-determination of plaintiff's rating. I don't know of any. The personnel file here before me would not reflect it. * * *

Q. What file would reflect that change, if made? A. The attorney register is the one kind of thing that would reflect that kind of a change. * * *

I don't know whether or not, since the separation of Oliver W. Toll in October of 1953, his name has appeared on the employment register. His name appears on a re-employment list which is given first

consideration when we are thinking of employment. * * * We only maintain re-employment lists for one year. When there were names on our re-employment list they were reviewed to determine whether they should be re-employed, or whether someone from the attorney register should be re-employed, in the case of a vacancy. In the excepted service it is up to the agency to determine who will be re-employed. * * *
801 The re-employment list is reviewed at the same time, to see if there is anyone who would fit a particular job. Now, whether they come first or they are intermingled with the others and consideration given, is something that is indefinite enough so that I couldn't say that they come first or afterwards. * * * The re-employment list was a separate list. * * * The re-employment list shows no scores. * * *

I am not too sure that the re-employment list shows whether or not the individuals are veterans or non-veterans. Other than to list the people and to consider them, there is no purpose for keeping a re-employment list. We keep a re-employment list of those we had reduced in force in order to give them consideration. Now, in the competitive service it is mandatory that you keep a list of those who have re-employment rights for one year, people with status. * * * The attor-
802 neys register indicates the scores, but the re-employment list does not. There is no requirement, when we are hiring new attorneys, that they be in the top ten or the top five scores. No such requirement. * * * If the top ten are not considered to be the ones that the board is interested in hiring, they are not hired, the eleventh man may be picked. We have no rule on that register. * * * We review the top of the register, but if we are not interested in employing the top man on that register we do not employ him. We may pick a man well down on the list. We will look at all the ones ahead of him, though, before we pick the man well down, and consider him. It is the same as to their veteran status. Now, the veterans status is something that you always review
803 in terms of you don't pass over a veteran to employ a non-veteran. * * * By "pass over" I mean we just don't hire a non-veteran who has a lower rating, or even a non-veteran who has a higher rating in some instances.

* * * I would not say that all people who have been hired since Mr. Toll was released or discharged have been veterans. I would be almost willing to make the statement that all attorneys in grade 11 who have been hired since he was discharged were veterans. * * * A statement of the reasons for passing over a veteran has not been filed with respect to plaintiff, nor prepared. * * *

804 When we come to employ an attorney in the excepted service, we can pick our new employee from any part of the employment list of new applicants. I believe that we can go further than that, and pick an attorney up off the street, for that matter, as far as the law is concerned, We certainly do consider veterans on the re-employment list, see if they are going to fit our job, and would likely hire them in preference to other attorneys that we would have to train. The requirement in the excepted service, now, is such that I don't see where it would be necessary to give them absolute preference over any other attorneys. They have no preference which we must give them. * * * As to hiring new employees, I think as long as we meet the requirements of the Veterans Preference Act to give a veteran preference, that is all that is necessary in connection with the excepted service, any veterans.

Q. You do not have to give a preference to veterans on the re-employment list? A. They have no preference which we must give them.

Mr. Ryan: To keep this straight in my mind, this is a person who is on the re-employment list?

The Witness: That's right.

Q. And you do not consider the scores for a man on the employment list as against the scores of the men on the new employment register? A. That is correct.

805 * * * I don't know how many veterans we have had on the re-employment list for legal positions since the RIF of 1953. I can see the list in my mind. I would judge that a dozen would be a fairly close estimate. As to approximately how many attorneys we have employed since that time, again I would have to give an estimate. I would say 50. I would say almost all of them were veterans. But there may have been

attorneys employed who were not veterans. * * *

806 * * * We do not have approval of competitive levels as such from the Civil Service Commission. * * * My memory was that Mr. E.A. Dunton was in charge of the group for reductions in force at the Civil Service Commission, whatever it may have been called in those days, and his office reviewed the competitive levels that had been proposed. * * * I talked to Mr. Dunton. We discussed these competitive levels,

807 whether they were correctly set up. * * *

809 In hiring people, we put everybody on the same list: all GS-11's. There was no distinction between attorney advisors or trial attorneys.

Q. Did it occur to you * * *, since you hire everybody from one list, the logical competitive level would be all GS-11 attorneys? A. It might occur to someone that such would be the case. However, the law provides that competitive levels are positions that are interchangeable, not people; competitive levels were established on the interchangeability of positions. * * *

810 The regulations provide that the GS grade is not necessarily decisive as to the competitive levels, in other words, that the competitive level may contain more than one GS grade. We considered it and decided that it would not be a reasonable proposition for us to combine grade levels in one competitive level. I did not discuss that with Mr. Horton as to the Trade Practice Conference to the best of my knowledge. I think we discussed the problem as an over-all problem within the Commission, and it was determined that although some of the attorneys at higher grades might possibly be able to occupy the positions of the attorneys at lower grades, in almost every instance it would be almost impossible to take an attorney out of the lower grade and consider that he was qualified to step up into a higher grade, that the work was more or less difficult. It was our decision.

Q. Who made that decision? A. I cannot tell you who made that decision. * * * It is possible I may have made that decision after dis-

811 cussions. * * * I did not make that decision in relation to particular bureaus. * * * Only as a general decision.* * *

812 I did not check over the reduction in force to find out whether it was proportional either as to bureaus or as to grades. Mr. Parrish, the Executive Director, made that check.

When you gave a bureau head the retention register as set up affecting his bureau * * * aside from reassignment rights it was obvious which job the man would be low in his bureau. * * * There was an allocation of cuts between bureaus, by money. So that he had to save a certain amount in annual salaries by cuts in his bureau. From the retention register and from many things he would know which employees were subject to being discharged in order to realize that saving. He would have to find out their salaries. * * * He would have an estimate that if he cut so many of a certain grade that he would realize his savings. If the low man on the retention register in a particular competitive level carried a certain salary, and he was in his bureau, he would know that that man would be leaving his bureau, or at least that salary would not longer be necessary for him to carry. If he cut that low man his responsibility was over. If that man had bumping rights somewhere, then the other person he bumped would be the person. But in excepted service there are no bumping rights. Therefore, he would know that that man would be the man to go, if he were low. And by looking at the retention register as affecting his bureau, he would know that this man was low in this level, and the next man was low in that level, and so on. In the excepted service he would know who would go. He would have available the information as to who would be leaving, that is correct. In the excepted service he could, in effect, compile a list of men
813 all of whom were vulnerable to dismissal. And in each bureau there would be a good many different competitive levels. Merely by looking at the retention register, it would have been possible for the bureau chief, in effect, to obtain a list of men all of whom were vulnerable.

Q. All he had to do was to look at the register; is that not true?
A. It would be possible.

Q. By looking at the register, is that not true? A. That is right.

Q. How was his decision determined to fire one or another of

these vulnerable men? A. You would have to ask him.

He did not consult me about it. Only after it came to the point of an individual's rights did I have anything to do with the decision as to who was cut. The initial decision as to who would be the individuals to be reduced by the bureaus, I had nothing to say. There were no written standards formulated by which the bureau chief made that decision. His administrative judgment would have been the only thing I can think of. It was the bureau chief who made the decision. In Trade Practices Conferences it was the director of the bureau. * * *

814 There were no standards that I know of formulated for the bureau chiefs, as to the exercise of that discretion. * * * I would say maybe in Trade Practices Conferences there might have been fifteen, all of whom were vulnerable, they were low men. I can't even say that the bureau chief exercised his discretion among them. I don't know whether he even looked at the register, or raised any issues. As to how he picked those three men, I don't know. He might have drawn lots, for all I know.

I don't know how closely the actual reduction in force corresponded to the estimate of the amount to be saved. I think it came very close. * * *

Robert L. Wald, I don't know his grade. He was hired since the reduction in force. William R. Somers, I don't know his grade. Kent P. Kratz was employed. Harold L. Horan was employed. Just read the names. I don't remember any individuals grades as such.

Q. William H. Cook, Ray C. Norvell, Frank M. Whiting, William R. Tincher, Robert D. Rolander, Henry G. Pons, Roslyn D. Young, Janet D. Saxon, William R. Mahanna, William H. Haley? A. Yes, they have all been employed. As to their grades, no. * * * I don't believe Haley was employed within a year after. Maybe he was. Mahanna, no, I don't think so. Maybe some of the others. I don't know the dates they came on. They have all been employed by the Federal Trade Commission.

Mr. Toll: Let the record show that the position description sheets which were turned in by Mr. Delaney and which will be attached to the
815 deposition, are respectively the position description sheets as of September 1953 for the positions of Toll, Hubler and Sloan.

Mr. Ryan: May the record show that Mr. Delaney has complied with the subpoena duces tecum which was served upon him, or at least no objection is made to the compliance.

/s/ John A. Delaney

[Certificate of Notary]

[The following exhibits were attached to the deposition of John A. Delaney]

EXHIBIT A

148 Standard Form No. 75. United States Civil Service Commission

POSITION DESCRIPTION

1. Dept'l. 2. OFFICIAL HEADQUARTERS: Washington, D.C.

5. C.S.C. CERTIFICATION NO.: 101.

* * * *

CLASS: SERVICE: P; SERIES; 970: GRADE: 4 * * *

* * * *

11. DEPARTMENT, AGENCY, OR ESTABLISHMENT: Federal Trade Commission.

a. FIRST SUBDIVISION: Bureau of T.P.C. & W.A.A.

b. SECOND SUBDIVISION: Rule Administration Division.

* * * *

16. Description of duties and responsibilities (See Guide to Position Classifiers, Employees, and Supervisors for the Preparation of Position Descriptions, Standard Form No. 75A)

Performs responsible and moderately difficult legal work relating to the administration, interpretation and observance of trade practice rules promulgated by the Commission for various industries.

More specifically, maintains close liaison with members of industries under rules, to bring about promptly wholesale cooperative compliance and to see that the rules are kept current so as to inhibit

existing unfair trade practices; renders opinions as to whether the members of industries are violating any of the antitrust or other laws, or the provisions of applicable trade practice rules and recommends remedial action either administratively by the Division or by investigation leading to formal complaint; interprets to members of industries existing trade practice rules; writes correspondence respecting alleged violations and writes and signs reports and memoranda transmitting cases for action of higher authority; when called upon reviews the work of P-3 attorney-advisers engaged in administering, interpreting and effecting industry-wide cooperation with the provisions of trade practice rules; performs related duties as assigned.

The attorney-adviser P-4 has duties generally similar to those of attorney-adviser P-5 except that his assignments pertain to the administration of trade practice rules for small industries involving a somewhat
149 technical subject matter and rather difficult legal problems or for large industries presenting relatively few difficult or technical legal problems.

Supervision received

Assignments are sometimes accompanied by general instructions as to Commission policy and procedure, results desired, etc. Liaison activities are carried on independently. All correspondence, reports and memoranda are reviewed for completeness, accuracy and conformance of recommendations with established policies.

Supervision exercised

None except occasional review of work done by P-3 attorney-advisers.

EXHIBIT B

150 Standard Form No. 75. United States Civil Service Commission

POSITION DESCRIPTION

1. Dept'l. 2. OFFICIAL HEADQUARTERS: Washington, D. C.

5. C.S.C. CERTIFICATION NO.: 102.

* * * *

CLASS: SERVICE: ~~P~~; GS; SERIES: 970: GRADE: ~~2~~ 9 * * *

* * * *

11. DEPARTMENT, AGENCY, OR ESTABLISHMENT: Federal Trade Commission.

a. FIRST SUBDIVISION: Bureau of T. P. C. & W. A. A.

b. SECOND SUBDIVISION: Rule Administration Division.

* * * *

16. Description of duties and responsibilities (See Guide to Position Classifiers, Employees, and Supervisors for the Preparation of Position Descriptions, Standard Form No. 75A)

Performs responsible and somewhat difficult legal work relating to the administration, interpretation and observance of trade practice rules promulgated by the Commission for various industries.

More specifically, maintains close liaison with members of industries under rules, to bring about promptly wholesale cooperative compliance and to see that the rules are kept current so as to inhibit existing unfair trade practices; renders opinions as to whether the members of industries are violating any of the antitrust or other laws, or the provisions of applicable trade practice rules and recommends remedial action either administratively by the Division or by investigation leading to formal complaint; interprets to members of industries existing trade practice rules; writes correspondence respecting alleged violations and writes and signs reports and memoranda transmitting cases for action of higher authority; performs related duties as assigned.

The attorney-adviser P-3 has duties generally similar to those of attorney-advisers P-4 and P-5 except that his assignments pertain to the
151 administration of trade practice rules for small industries such as the Common Pin Industry, involving small membership, nontechnical subject matter, few complex legal problems and relative ease of enforcement by the industry itself. The attorney-adviser P-3 may also work along with a P-5 or P-6 attorney-adviser on the less difficult phases of assignments of major importance and complexity.

Supervision received

Assignments are accompanied by rather specific instructions as to Commission policy and procedure, methods, and results desired. Liaison activities are carried on independently. All correspondence, reports and memoranda are reviewed for completeness, accuracy and conformance of recommendations with established policies.

Supervision exercised

None.

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153 (Filed February 29, 1956)

ANSWER

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Plaintiff is guilty of laches. According to the allegations of the complaint the plaintiff was removed from government employment on October 9, 1953. He appealed through the Civil Service Commission, and on September 30, 1954 the Board of Appeals and Review affirmed the action of the agency in reducing the plaintiff as part of the reduction-in-force. Suit was not filed until January 26, 1955.

Third Defense

Replying to the specific allegations of the complaint defendants aver as follows:

FIRST: Defendants are not required to answer the allegations of paragraph FIRST.

SECOND: The allegations of sub-division (1) of this paragraph contain conclusions of law to which defendants are not required to plead. Sub-division (2) of this paragraph contained conclusions of fact and law to which defendants are not required to plead. Sub-division (3) of this paragraph contained conclusions of law to which defendants are not required to plead. Sub-division (4) of this paragraph contained conclusions of law and fact, but insofar as facts are therein alleged they are denied. Sub-division (5)

of this paragraph contained conclusions of law and fact, but insofar as
154 facts are therein alleged they are denied.

THIRD: The allegations of this paragraph do not require an answer on the part of the defendants.

FOURTH: The allegations of this paragraph do not require an answer on the part of the defendants.

FIFTH: Admitted.

SIXTH: It is denied that Edward F. Howrey is at the present time a Commissioner of the Federal Trade Commission. It is denied that the named members constitute the entire Board of said Commission. It is denied that Albert A. Carretta is a defendant in this suit, this Court having on March 3, 1955 dismissed this action as to Mr. Carretta in an Order of that date signed by District Judge Richmond B. Keech. The remaining allegations of this paragraph are admitted.

SEVENTH: Defendants are not required to answer the allegations of paragraph SEVENTH.

EIGHTH: Admitted.

NINTH: It is denied that plaintiff was illegally and unlawfully discharged by the defendants. The rest of the allegations of paragraph NINTH are admitted.

TENTH: This paragraph contained conclusions of fact and law to which defendants are not required to plead. Insofar as facts are therein alleged they are denied.

ELEVENTH: It is admitted that at the time of plaintiff's discharge from employment by the Federal Trade Commission plaintiff was rated "Satisfactory". The rest of this paragraph contains conclusions of fact and of law to which the defendants are not required to plead, but insofar as facts might therein be alleged they are denied.

TWELFTH: It is admitted that on September 8, 1953 plaintiff was employed as an attorney by the Federal Trade Commission. It is further admitted that plaintiff was and is a Veterans Preference eligible. It is further admitted that plaintiff was notified by defendant John A. Delaney, as Director of Personnel of the Federal Trade Commission, that due to a

155 reduction-in-force in the Federal Trade Commission plaintiff would be separated from his job position. It is further admitted that on October 9, 1953 plaintiff was in fact separated and discharged from his position. It is also admitted that plaintiff has at no time been reinstated in such position or reassigned to a comparable position. It is also admitted that demand for such reassignment has been made. The remaining allegations of this paragraph contain conclusions of fact and law to which defendants are not required to plead, but insofar as material facts might be alleged they are denied.

THIRTEENTH: It is admitted that Kenneth L. Sloan and Lynn M. Hubler were employed in Grade GS-9 in the Federal Trade Commission in the same competitive area as plaintiff. It is admitted that these two individuals were in a different competitive level than plaintiff. It is admitted that Sloan and Hubler in addition to plaintiff were classified as holding excepted positions and indefinite appointments. It is admitted that Sloan and Hubler were Veterans Preference eligibles. It is admitted that Sloan and Hubler were not separated in the reduction-in-force in which plaintiff was separated. The remaining allegations of paragraph THIRTEENTH contain conclusions of fact and of law to which defendants are not required to plead, however, insofar as other facts are pleaded they are denied.

FOURTEENTH: The allegations of this paragraph contain conclusions of law to which the defendants are not required to plead.

FIFTEENTH: This paragraph contains conclusions of law and fact to which defendants are not required to plead, but insofar as facts might be alleged they are denied.

SIXTEENTH: It is admitted that plaintiff appealed his discharge to the Civil Service Commission. It is admitted that an adverse decision was rendered by E. A. Dunton, Chief Examining Office, Civil Service Commission, dated April 9, 1954. It is admitted that the plaintiff then appealed to the Commissioners of the Civil Service Commission who through

156 Chairman John E. Blann of the Board of Appeals and Review by letter dated

September 30, 1954 affirmed the action of Mr. Dunton in failing to sustain plaintiff's appeal. The rest of this paragraph contains conclusions of fact and law unto which defendants are not required to plead.

SEVENTEENTH: Defendants state as their answer to the allegations of paragraph SEVENTEENTH all of the answers which have respectively been made to paragraphs THIRD through and including SIXTEENTH herein.

EIGHTEENTH: Defendants are not required to answer the allegations of this paragraph.

NINETEENTH: The allegations of this paragraph contain conclusions of law and fact to which defendants are not required to plead.

TWENTIETH: The allegations of paragraph TWENTIETH contain conclusions of fact and of law to which defendants are not required to plead.

TWENTY-FIRST: Paragraph TWENTY-FIRST contains conclusions of fact and law to which defendants are not required to plead, but insofar as facts are therein alleged they are denied.

TWENTY-SECOND: Defendants incorporate as their answer to paragraph TWENTY-SECOND all the answers herein made to paragraphs THIRD through TWENTY-FIRST inclusive.

TWENTY-THIRD: It is denied that plaintiff was refused the right to examine the retention register prepared in connection with the reduction-in-force. The remaining allegations of this paragraph are conclusions of law and fact to which defendants are not required to plead, but insofar as facts might have been alleged they are denied.

TWENTY-FOURTH: It is admitted that no transcript of the Civil Service Commission hearing was made. It is admitted that the general public and friends of the plaintiff were excluded from said hearing. It is admitted that a shorthand reporter was not permitted to make a transcript of the proceedings, said shorthand reporter having appeared on plaintiff's request. It is admitted that Mr. E. A. Dunton was not present at the hearing. The remaining allegations of this paragraph contain conclusions
157 of fact and of law to which defendants are not required to plead, however, insofar as material facts might be alleged they are denied.

TWENTY-FIFTH: The allegations of this paragraph are conclusions of fact and law to which defendants are not required to plead.

TWENTY-SIXTH: For answer to the allegations of this paragraph defendants assert the answers provided for paragraphs THIRD through TWENTY-FIFTH herein.

TWENTY-SEVENTH: The allegations of this paragraph contain conclusions of law and fact to which the defendants are not required to plead, but insofar as material allegations of fact are made they are denied.

TWENTY-EIGHTH: It is admitted that defendants do not have absolute discretion in the matter of employing civilian personnel. It is admitted that defendants are subject to the provisions of law relating to Veterans Preference. The remaining allegations of this paragraph contain conclusions of law and fact to which defendants are not required to plead, but insofar as material facts might be alleged they are denied.

TWENTY-NINTH: For answer to the allegations of this paragraph defendants incorporate by reference the answers already made to paragraphs THIRD through TWENTY-EIGHTH.

THIRTIETH: It is admitted that plaintiff has made demand upon the defendants to be reemployed on the staff of the Federal Trade Commission, and to have his name placed on any and all reemployment lists maintained by that Commission. It is also admitted that the plaintiff has requested the Civil Service Commission to place his name on all appropriate registers or lists of eligibles for attorneys positions for which he might be qualified. The remaining allegations of this paragraph insofar as material facts are concerned are denied.

Fourth Defense

For further answer and as a separate and complete defense to the complaint defendants aver that the administrative proceedings have been properly conducted pursuant to law and regulations, that there has been
158 no arbitrary or capricious determination made anywhere within the said administrative proceedings, and that the final result is premised upon a careful consideration of the entire administrative record and the applica-

tion of appropriate statutory law, that there has been a judicious exercise of discretion by the administrative authorities based upon the entire record, that such discretion having been reasonably and properly exercised and such determinations having been reasonably and properly made they should not be distributed by this Court.

WHEREFORE, having fully answered plaintiff's complaint defendants demand judgment together with the costs of this suit.

/s/Leo A. Rover
United States Attorney

Certificate of Service

I hereby certify that service of the foregoing Answer has been made upon plaintiff by mailing a copy thereof to him as follows: Oliver W. Toll, Room 511, 777 14th Street, N.W., Washington, D.C., this 29th day of February 1956.

/s/ Joseph M. F. Ryan, Jr.
Assistant United States Attorney

(Filed March 2, 1956)

185 Motion for Summary Judgment

Comes now the defendants, by their attorney, the United States Attorney, and moves this Court for an order granting summary judgment herein, on the basis that it appears from the documents certified by William C. Hull dated April 5, 1955, attached to and made a part of this motion, from the affidavits of John A. Delaney, dated February 23, 1955, attached to and herein made a part of this motion, and from the certified

records of the Federal Trade Commission, in particular, the staff notice re the extent of the reduction in force dated September 3, 1953, the standard form 50--notice of personnel action re appointment of Oliver W. Toll, and the reduction in force notice of the Federal Trade Commission to Oliver W. Toll, all of which documents have been certified and are attached to and made a part of this motion, and that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

/s/ Leo A. Rover
United States Attorney

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162 [Filed March 2, 1956]

I certify that the attached photostats consisting of thirteen pages are true copies of records on file in the United States Civil Service Commission relating to the reduction-in-force appeal of Oliver W. Toll, born August 3, 1891, under Section 12 of the Veterans' Preference Act of 1944, as amended, and that I have legal custody of such records.

/s/ WILLIAM C. HULL

Executive Assistant to the Commissioners
United States Civil Service Commission
Washington, D.C.

April 5, 1955
(SEAL)

[Attached to said certificate was a photostatic copy of Form 50 containing the following information:]

163 STANDARD FORM 50: NOTIFICATION OF PERSONNEL ACTION.

(1) NAME: Mr. Oliver W. Toll. (2) DATE OF BIRTH: 8-3-91

(3) JOURNAL OR ACTION NO.: 430. (4) DATE: 6-19-51.

(5) NATURE OF ACTION: Excepted Appointment (Indefinite in accordance with Executive Order 10180). (6) EFFECTIVE DATE: 6-11-51. (7) CIVIL SERVICE OR OTHER LEGAL AUTHORITY: Schedule A 6-101 (d). (8) POSITION TITLE: Attorney-Advisor. (9) SERVICE, SERIES, GRADE, SALARY: GS-11 $5,400.00 (10) ORGANIZATIONAL DESIGNATIONS: Office of The Chairman, Division of Defense Surveys. (11) HEAD-

QUARTERS: Washington, D. C. (12) FIELD OR DEPARTMENTAL: Departmental. (13) VETERAN'S PREFERENCE: 5-Pt. (14) POSITION CLASSIFICATION ACTION: Vice. (15) SEX: M. (16) RACE: W. (17) APPROPRIATION: _____. (18) SUBJECT TO C.S. RETIREMENT ACT: Yes. (19) DATE OF APPOINTMENT AFFIDAVITS: 6-11-51. (20) LEGAL RESIDENCE: Proved. STATE: Colorado. (21) REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements. Subject to a trial period of 1 year satisfactory service. * * * Entrance Performance Rating: Satisfactory.

[Also attached to said certificate was a photostatic copy of the following:]

164 FEDERAL TRADE COMMISSION
Washington

NOTICE TO THE STAFF

Re: Extent of Reduction in Force

In order to avoid any misunderstanding with reference to the extent of the required reduction-in-force, I am quoting below in full text the Budget Officer's memorandum of August 21, 1953, addressed to me as Chairman:

"In accordance with your request there is transmitted herewith a summary reflecting the amount of the reduction-in-force required at this time in order that the Commission may operate within its appropriated funds during fiscal year 1954.

While the 1954 appropriation of $4,053,800 is only $125,000 less than the funds available for 1953, the cost of operations for fiscal year 1954 will require a reduction-in-force of at least $270,000 on an annual salary basis. It is believed that this will require a reduction of 40 to 50 employees depending on the amount of their salaries and their terminal leave. (The above figures are based upon the assumption that the reduction-in-force notices

will be delivered to employees prior to September 4, 1953.)

In preparing this forecast general operating expenses of the Commission have been estimated at the absolute minimum and at a lower amount than the 1953 actual expenditure. An additional item of expenditure which must be provided for 1954 is an estimated $25,000 for the cost of penalty mail required by Public Law 286, 83rd Congress. It is estimated that the total general operating expenses for the Commission for the fiscal year 1954, including travel and penalty mail, will amount to $290,500 which will leave $3,763,300 available for personal services.

The estimated obligations for personal services based on expenditures to date plus the projected cost of the present payroll to June 30, 1954 amount to $3,906,500 which exceeds the amount available for personal services by $143,200, which amount must be made up in nine months' operations. When converted to an annual rate of expenditure this amounts to $191,000. To this must be added additional requirements not heretofore considered which include additional terminal-leave-payments, within-grade promotions, miscellaneous promotions and other contingencies, and the estimated cost of overtime pay -- totaling an estimated $79,000. Therefore, it is necessary that personal services be reduced $270,000 ($191,000 plus $79,000) below the present operating level of the Commission as soon as possible.

165 ESTIMATED REDUCTION-IN-FORCE REQUIRED

Appropriation, 1954 Fiscal Year		$4,053,800
Less: Est. Minimum Requirements for Other Expenses:		
Travel	$ 140,000	
Penalty Mail	25,000	
Other expenses (Telegrams, Telephone Calls, Supplies, etc.) . . .	125,500	290,500
Net Available Personal Services		$3,763,300
Estimated Obligations - Personal Services to 9-30-53	$1,006,500	

Cost of Present Payroll 10-1-53 to 6-30-54		$2,900,000	$3,906,500
Estimated Deficit to be Made Up in nine months			- 143,200
Conversion of deficit to annual basis.		- 191,000	
Additional Costs not covered above:			
Terminal leave payments	$14,000		
Within-Grade Promotions for Year	27,000		
Promotions and other Contingencies	30,000		
Est. Cost Overtime Pay	8,000	- 79,000	
REDUCTION REQUIRED ON AN ANNUAL SALARY BASIS		$ 270,000	

/s/ Edward F. Howrey,
Chairman

September 3, 1953

[Also attached to said certificate were photostatic copies of the following:

166-167 Letter to plaintiff from John E. Blann, Chairman, Board of Appeals and Review, Civil Service Commission, dated November 2, 1954;

168-169 Letter to plaintiff from John E. Blann, Chairman, Board of Appeals and Review, Civil Service Commission, dated September 30, 1954;

170-171 Letter to plaintiff from E. A. Dunton, Chief, Appeals Examining Office, Civil Service Commission, dated April 9, 1954;

172 Office Memorandum, to the Files from George F. St. Lawrence, Reductions in Force Investigator, dated March 1, 1954;

173 Office Memorandum, to Mr. E. A. Dunton, Chief, Appeals Examining Office, from Mrs. Harriet V. Cooke, dated February 25, 1954;

174-175 Office Memorandum, to Mr. L. W. Valentine, from Mrs. H. V. Cooke, undated.]

(Filed March 2, 1956)

177 UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

I, Robert M. Parrish, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that attached is a full, true, and complete copy of:

Federal Trade Commission notice to
the staff re extent of reduction in
force dated September 3, 1953

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed this 24th day of February, A.D. 1955, at Washington, D. C.

Robert M. Parrish
Secretary

(seal)

178-179 [Attached to said certificate was a copy of the "Notice to the Staff" which appears at R. 164]

180-181 [Also filed March 2, 1956, was another certificate by Robert M. Parrish, identical in form with the certificate which appears at R. 177, to which was attached a copy of the Form 50 which appears at R. 163.]

182 [Also filed March 2, 1956, was another certificate by Robert M. Parrish, identical in form with the certificate which appears at R. 177, to which was attached a photostatic copy of the following:]

183 FEDERAL TRADE COMMISSION
Washington 25

September 8, 1953.

Mr. Oliver W. Toll
Federal Trade Commission
Washington, D. C.

Dear Mr. Toll:

Due to severe budget curtailment it has become necessary for the Federal Trade Commission to reduce its staff. As a Schedule A attorney in subgroup III-A, you have been reached for reduction-in-force in your

competitive level, you have no reassignment rights and your last day of active duty will be October 9, 1953. However, you will be carried on a reemployment list until September 8, 1954.

Your selection for separation has been made in accordance with Civil Service regulations governing reduction-in-force which require that separations be made from a competitive register of all employees affected. The retention register is prepared on the basis of nature of appointment, Civil Service status, veteran's preference, performance rating and length of federal service. Regulations concerning reduction-in-force and the retention register on which your name appears are available for your inspection in Room 290, Federal Trade Commission Building. The Office of Personnel will be glad to answer any inquiry as to your rights and privileges and will endeavor to be of every service to you. If after examining the procedures and retention register you believe this action has been improperly taken, any discrepancies contrary to regulations which have been made inadvertently will be corrected. If you still believe there has been a violation of your rights under military preference laws or the regulations of the Civil Service Commission, you may appeal in writing within ten days to the Reduction in Force Unit, Civil Service Commission, Washington 25, D. C.

Since you have a competitive status, although not in your present position, you may apply to the Civil Service Commission through the submission of two copies of Form 57 for any position for which you qualify for which the Civil Service Commission maintains registers. However, the Civil Service Commission does not maintain registers for attorney positions. You will be certified in priority order from Civil Service registers for filling vacancies for which you apply.

You will receive a lump sum payment for all annual leave remaining to your credit as of October 9, 1953, with the exception of annual leave over thirty days which was earned this calendar year. If you have more than thirty days which was earned this calendar year you may use the excess during your active duty notice period.

184 Your efforts and the service you have rendered the Commission are

sincerely appreciated and it is with reluctance that this action is being taken, but there is no alternative. Your separation in no way reflects on your ability or the service you have performed.

You have the best wishes of the Commission for your future success.

Very truly yours,

/s/ John A. Delaney,
Director, Office of Personnel.

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194 (Filed March 2, 1956)

AFFIDAVIT

Before me, Dorotha D. Noonan, a Notary Public in and for the District of Columbia, personally appeared John A. Delaney, to me known to be the Director of Personnel for the Federal Trade Commission, who being first duly sworn deposes and says:

> This is to certify that I showed Mr. Oliver W. Toll the retention register covering all excepted attorneys in the headquarters office of the Federal Trade Commission several days after he was issued his reduction-in-force notice.
>
> /s/ JOHN A. DELANEY

Subscribed and sworn to before me this 23rd day of February, 1956, at Washington, D. C.

My commission expires Nov. 14, 1956

/s/ Dorotha D. Noonan
Notary Public

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195 (Filed March 2, 1956)

AFFIDAVIT

Before me, Dorotha D. Noonan, a Notary Public in and for the District of Columbia, personally appeared John A. Delaney, to me known to be the Director of Personnel for the Federal Trade Commission, who being first duly sworn deposes and says:

This is to certify that if all grade GS-11 attorneys throughout the Federal Trade Commission had been placed in the same competitive level, Mr. Oliver W. Toll would have been reached for reduction-in-force with the abolition of one position.

/s/ JOHN A. DELANEY

Subscribed and sworn to before me this 23rd day of February, 1956, at Washington, D. C.

My commission expires Nov. 14, 1956

/s/ Dorotha D. Noonan
Notary Public

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196 (Filed March 9, 1956)

Motion to Amend Complaint

Plaintiff moves the Court for leave to amend the Complaint heretofore filed, pursuant to the amendments set forth in the "First Amendment to Complaint", a copy of which is attached hereto as Exhibit 1, involving amendments of paragraphs * * * Twenty-fifth, Twenty-seventh and Thirtieth of the Complaint.

For grounds of this motion plaintiff states:

1. The proposed amendments are proper in order to indicate more precisely than had been done in the original Complaint the issues of fact involved in this case.

2. The allegations contained in the amendment which is sought to be made to paragraph Twenty-seventh of the Complaint are relevant and material to plaintiff's right to obtain a judicial review, in that they show that there is a real issue as to the deliberate and unlawful abuse of the use of reduction in force proceedings for the purpose of evading the provisions of the civil service laws and the Veterans' Preference Act.

3. The allegations contained in the amendment which is sought to be made to paragraph Twenty-fifth of the Complaint are relevant and material to plaintiff's right to obtain a judicial review of factual matters

supposedly determined by an administrative agency, in that they show
197 that plaintiff was not permitted to present such issues to the agency and that the agency did not in fact determine them.

4. The allegations contained in the amendment which is sought to be made as to paragraph Thirtieth of the Complaint are relevant and material to plaintiff's rights of reemployment under the Veterans' Preference Act, in that they more specifically show the denial of plaintiff's reemployment rights.

5. Plaintiff should be permitted to file the "First Amendment to Complaint" now sought to be filed in that it was tendered for filing before any valid service of the Answer in this case had been made, as appears from Exhibit 2, attached hereto.

/s/ Oliver W. Toll
Plaintiff, Pro Se.

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198 [Attached to Motion to Amend Complaint, filed March 9, 1956]

Exhibit 1

FIRST AMENDMENT TO COMPLAINT

(For Declaratory Judgment, Reinstatement, and Other Relief)

Plaintiff files herewith his First Amendment to the Complaint in this action, consisting of an amendment to paragraphs * * * Twenty-fifth", "Twenty-seventh" and "Thirtieth" of the Complaint herein, by substituting therefor the paragraphs hereinafter designated by the same paragraph numbers, respectively, (leaving all other paragraphs and portions of the original Complaint and of the Supplemental Complaint unaffected and in full force and effect), to-wit:

* * * * * *

199 TWENTY-FIFTH: At the hearing held by the Civil Service Commission upon Plaintiff's appeal from his separation from employment, Plaintiff attempted to present evidence as to each of the following

matters, to-wit: that the reduction in force was not based upon any financial necessity, but that it was conducted in bad faith and for ulterior purposes; that an adequate comparison of Plaintiff's statutory rights with those of others was not allowed, and that the formation of the fragments of personnel ("competitive levels") upon which application of Plaintiff's statutory rights was based did not correspond to the actual interchangeability of attorneys and functions in the Federal Trade Commission or in the Bureau of Industry Cooperation in which Plaintiff was employed, and was contrary to the facts and unwarranted; that the reduction in force was conducted for the purpose of "reaching" specific persons rather than on the basis of impersonal judgments as to
200 work load and numbers and functions of personnel; that transfers of personnel had been made immediately prior to the reduction in force for the purpose of rearranging the "competitive levels" so as to accomplish the separation of certain employees and to prevent the separation of others, contrary to the normal and proper operation of the rules of the Veterans Preference Act; and Plaintiff also sought to inquire into the facts with respect to pre-arrangements, as to the reduction in force, between the Federal Trade Commission and the Civil Service Commission. As to each and all of such matters Plaintiff's attempt to present evidence and to ascertain the facts were cut off over Plaintiff's objection by the persons presiding at the hearing. In connection with debarring Plaintiff from introducing evidence or ascertaining the facts as to such matters, the persons presiding at the hearing stated: that the Civil Service Commission did not desire to hear evidence from the Plaintiff as to the propriety of the formation of the "competitive levels", but would rely instead entirely upon the reports of its own investigators; that an agency could conduct a reduction in force for any purpose whatever which it desired, and regardless of budgetary necessity, and for the purpose of reaching specific employees for discharge; that it was not proper for Plaintiff to introduce evidence as to the manner and methods by which individuals separated in a reduction in

force had been selected for separation; and that the Civil Service Commission had no jurisdiction as to such matters and could not go into them. Plaintiff was reproved by the persons presiding at the hearing for taking up the time of the hearing with such matters. In general tenor and effect, the rulings of the persons presiding at said hearing excluded from presentation in evidence and from consideration all matters except the single question whether the plaintiff had been the "low man" in the "competitive level" in which he had been placed. Throughout the hearing, considerable confusion and disorder prevailed, and both questions and responses were freely interrupted. From time to time during Plaintiff's attempt to present his case the persons presiding at the hearing engaged in examining files which
201 Plaintiff was not permitted to examine and indicated that the decision of the case would depend primarily upon the matters contained in such files. Such procedure, together with the fact that no transcript of the proceedings was obtainable, unavoidably induced in the Plaintiff a consciousness of the futility of attempts at presentation of his case, thereby further tending to prevent its adequate presentation. Prior to the hearing of Plaintiff's appeal, great and unreasonable difficulties existed and were interposed as to Plaintiff's investigation of the facts material to the determination of his rights, and at said hearing Plaintiff was unable to subpoena witnesses. After the hearing, defendant John F. Delaney submitted to the "adviser" who presided at the hearing an ex parte unsworn statement as to the statutory rights under the Veterans Preference Act of certain attorneys on the staff of the Federal Trade Commission whose positions and standings on the "retention registers" said defendant Delaney, on the ground that they were immaterial to Plaintiff's case, had refused to permit Plaintiff to examine. An opinion and ruling of the Civil Service Commission upon Plaintiff's case, thereafter rendered, relied in part upon said post-hearing ex parte statement. The matters hereinbefore alleged resulted in the impossibility of Plaintiff's obtaining before the Civil Service Commission an adequate, fair or proper hearing, and deprived Plaintiff of the right of appeal to which he was entitled

under the provisions of the Veterans Preference Act. In view of the facts hereinbefore alleged, the determination of the Civil Service Commission with respect to Plaintiff's appeal is not entitled to be accorded any credence, weight or effect as a determination of factual issues in this case. Great and unwarranted secrecy prevails as to many aspects of the hearings held by the Civil Service Commission in reduction in force cases. What appeals have been filed as to a reduction in force, how many, what decisions have been reached therein, and the grounds upon which decisions have been made are consistently concealed by the Civil Service Commission. Plaintiff is informed and believes, and so alleges, that the secrecy which surrounds such appeals, and the policy of rendering it impossible for an appellant to obtain a transcript of the proceedings, have been established in order to facilitate
202 the rendering of arbitrary, capricious and unreasonable decisions in such cases, and to prevent their public exposure and their effective appeal to the Courts. In view of the matters hereinabove set forth, Plaintiff alleges that the proceedings and determinations of the Civil Service Commission in such cases, and in Plaintiff's case in particular, are not entitled to any presumption of regularity, adequacy or verity.

* * * * * *

TWENTY-SEVENTH: Plaintiff is informed and believes and so alleges: The appointment of Edward F. Howrey (made a defendant in the original Complaint filed in this action) was accompanied with the assumption on his part of obligations and commitments to the Republican National Committee with respect to the appointment of personnel on the staff of the Federal Trade Commission acceptable to said Committee. After the accession of said Edward F. Howrey to the chairmanship of the Federal Trade Commission he was in practically complete control of the personnel affairs and policy of the Commission. Prior to the reduction in force proceedings under which Plaintiff was separated from his employment, the Republican National Committee established with respect to the Staff of the Federal Trade Commission a quota of positions which were required by said Republican National Committee

to be made available for appointments acceptable to said Committee in order to satisfy demands for Republican Party political patronage. Strong political pressure was exerted upon said Edward F. Howrey and his appointees on the staff of the Federal Trade Commission who were in charge of matters of personnel of the Commission to make positions upon the staff of said Commission available for Republican Party political patronage. Notwithstanding that the budget for the Federal Trade Commission for the fiscal year July 1, 1953, to June 30, 1954, was slightly reduced over that of the preceeding fiscal year, there was in September
203 and October, 1953, no necessity for a reduction in force of the staff of the Commission. The reason assigned for the purported reduction in force, -- "Due to severe budget curtailment, it has become necessary for the Federal Trade Commission to reduce its staff" -- did not actually exist, was without justification in fact, and was false and sham. The reduction in force was not instituted for any valid administrative reason, but was motivated and inspired by considerations of Republican Party patronage and was conducted in order to satisfy demands for political patronage on the part of the Republican Party and the Republican National Committee; and the object of said Edward F. Howery and his appointees in charge of said program was to create vacancies on the staff of the Federal Trade Commission in order that new appointments could shortly thereafter be made to said staff of persons sponsored and approved by said Republican National Committee. In order to carry out said illegal purposes and for the purpose of obviating objections with respect to violations of civil service laws and regulations which were intended to be made in the proposed reduction in force, the Director of Personnel of the Federal Trade Commission was, by illegal and fraudulent means and in violation of the civil service laws and regulations, superseded by defendant John A. Delaney, who was an expert in the intricacies of reduction in force procedure. The purposes of said Edward F. Howrey in conducting said reduction in force included also an intent to eliminate from the staff of the Commission groups and individuals who had been particularly aggressive

and effective in their efforts to secure strict enforcement of the anti-monopoly and antitrust laws. Said reduction in force proceedings were to a material extent effective in carrying out that purpose; and said unlawful purpose and program tainted with illegality the entire reduction in force program. Prior to the completion of the "retention register" for use in said reduction in force proceedings, a list was prepared of the names of persons desired to be "reached" in said proceedings, whose names had been selected upon considerations wholly apart from their rights to retention under the Veterans Preference Act or other civil service laws or regulations. For the purpose of rendering it possible to select the attorneys desired to be separated with the least incidental sacrifice of others, the reduction in force proceedings
204 were therafter so arranged that more than 40 per cent of the attorneys on the staff of the Federal Trade Commission were "low men" in the particular fragment of personnel ("competitive level") in which they were placed on the "retention register". The selection of the fragments of personnel ("competitive levels") from which employees were to be separated was made by reference to the desires of the persons conducting the reduction in force to separate particular individuals from employment from reasons wholly apart from the standards prescribed by Section 12 of the Veterans' Preference Act, and without any administrative reason or basis for selecting the particular fragment of personnel ("competitive level") from which employees were discharged rather than another. Such was the case as to the separation of the Plaintiff from his employment. By reason of the matters hereinabove alleged, the said reduction in force proceedings and Plaintiff's separation from employment in connection therewith were contrary to civil service laws, were conducted for the purpose of subverting said laws, and were illegal, null and void.

* * * * * *

THIRTIETH: Plaintiff has made due and timely demand upon Defendants to be reemployed on the staff of the Federal Trade Commission in any position for which Plaintiff's qualifications have been

established, and to have his name placed on any and all reemployment lists maintained for any attorney positions with said Commission. Plaintiff has made due and timely request of the Civil Service Commission that his name be placed on all appropriate registers or lists of eligibles for all attorney positions for which his qualifications have been established, and to be allowed the rights of reemployment to which Plaintiff is entitled. On information and belief, Plaintiff alleges that since Plaintiff was separated from his employment on October 8, 1953, and subsequent to said requests by Plaintiff, Defendants, for the purpose of satisfying demands of the Republican National Committee for patronage appointments, and without regard to the relative capacities of qualifications of the appointees as compared to those of the Plaintiff,
205 have appointed and employed other persons having lesser rights to employment according to the criteria of the Veterans' Preference Act of 1944, as amended, than those of the Plaintiff, and that such appointments have been made in violation of the provisions of Sections 8 and 15 of said Act. On information and belief, Plaintiff further alleges that Defendants herein have been and are cooperating in a program which requires the approval of the Republican National Committee as a prerequisite for appointments to the positions with respect to which, under the terms of the Veterans' Preference Act, Plaintiff has rights of reemployment. Plaintiff is unable to obtain such approval of the Republican National Committee. As a result of the foregoing matters, Defendants have rendered it impossible for Plaintiff to obtain the reemployment rights to which Plaintiff is entitled. Upon information and belief, Plaintiff alleges that had the requirements of the Veterans' Preference Act been observed in appointments to the staff of the Federal Trade Commission and by the Civil Service Commission with respect to Plaintiff's reemployment Plaintiff would have been reemployed.

/s/ Oliver W. Toll
Plaintiff, Pro Se.

District of Columbia: SS

Oliver W. Toll, being first dully sworn, on his oath deposes and says that he has read the foregoing First Amendment to Complaint by him subscribed and knows the contents thereof, and that the matters and things therein stated he verily believes to be true.

/s/ Oliver W. Toll

Subscribed and sworn to before me this 1st day of March, 1956.

HARRY M. HULL, Clerk

By/sg/Irene P. McFeely

Deputy Clerk

206 [Filed March 9, 1956]

Exhibit 2

Affidavit

DISTRICT OF COLUMBIA: SS

Oliver W. Toll, being first duly sworn, on oath deposes and says:

He is the plaintiff in civil action number 371-55 in the United States District Court for the District of Columbia, now entitled Toll v. Gwynne, et al. When the Complaint in said action was filed it contained in the caption plaintiff's name and full residence address, which address was "2 Newlands Street, Chevy Chase, Maryland", and was so stated in the caption.***

* * * * * *

207 On March 1, 1956, at approximately 9:10 A.M., plaintiff presented for filing in the United States District Court for the District of Columbia in said case number 371-55 a "First Amendment to Complaint", a copy of which is attached hereto, duly signed and verified and in all respects proper for filing in said action, and asked that it be filed. The Deputy Clerk to whom said "First Amendment to Complaint" was given and to whom said request was made refused to accept the same for filing upon the sole ground that no order of Court had been obtained therefor and that service of an Answer in said case had been made upon plaintiff on the preceding day as appeared from a certificate of service which had been filed in the office of the Clerk of the Court. Plaintiff was not at that time shown the certificate of service, and assumed

that it showed that the Answer had been mailed to plaintiff at his address as shown in the caption of the Complaint. At the time plaintiff tendered said "First Amendment to Complaint" plaintiff had not received any copy of said Answer and did not know that any Answer had been filed or that any copy thereof had been mailed to any address. At that
208 time, no responsive pleading in said action and no copy of an Answer had been mailed to plaintiff at his address as shown in the caption of his Complaint, and plaintiff had not been otherwise served with any copy thereof. * * *

* * * * * *

It is readily apparent from the nature of this action that plaintiff is at a great disadvantage in gathering the precise information which would be necessary in order to set forth highly specific allegations of fact in the original Complaint, prior to use of depositions under the Federal Rules of Civil Procedure. Since the original Complaint was filed, plaintiff has proceeded to take depositions, and the allegations contained in the proposed "First Amendment to Complaint" are based in part on information developed through such depositions as well as upon other investigations by the plaintiff.

/s/ Oliver W. Toll

Subscribed and sworn to before me this 9th day of March, 1956.

/s/ Annette M. Behan
Notary Public

My Commission Expires 3/14/60.

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212 [Filed March 14, 1956]

Interrogatories

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the plaintiff calls upon the defendants to answer the following interrogatories:

1. How many attorneys were employed on the staff of the Federal Trade Commission on each of the following dates:

(a) September 1, 1953?

(b) November 1, 1953?

(c) January 1, 1954?

(d) March 1, 1954?

(e) May 1, 1954?

(f) June 30, 1954?

2. What was the total amount expended for payment by the Federal Trade Commission for the entire fiscal year 1954 --

(a) For all salaries?

(b) For attorneys' salaries?

3. What was the total amount actually expended by the Federal Trade Commission for payment of personal services during the period July 1, 1953, to September 1, 1953?

213 4. How many employees were separated from employment at the Federal Trade Commission during the fiscal year 1954 from all causes (including death, resignation, dismissal, transfer to other agencies, etc.) other than reduction in force?

5. What was the aggregate payroll saving during the fiscal year July 1, 1953 to June 30, 1954 which resulted from the separations described in Interrogatory 4?

6. How many employees were separated from employment at the Federal Trade Commission through reduction in force during the fiscal year July 1, 1953 to June 30, 1954?

7. What was the aggregate payroll saving during the fiscal year July 1, 1953 to June 30, 1954 which resulted from the separations described in Interrogatory 6?

8. How many employees on the staff of the Federal Trade Commission received promotions in grade or in salary (other than within-grade increases in salary required by law) during the period from April 1, 1953, to July 1, 1954?

9. What additional expenditure resulted during the fiscal year July 1, 1953 to June 30, 1954 from the promotions described in Interrogatory 8?

10. What amount of the appropriation available for the Federal Trade Commission for the fiscal year 1954 remained unspent at the end of that fiscal year?

11. How many persons received new appointments to attorney positions on the staff of the Federal Trade Commission during the period from April 1, 1953 to July 1, 1954?

214 12. As to each person who received a new appointment to an attorney position on the staff of the Federal Trade Commission during the period from April 1, 1953, to July 1, 1954, state:

(a) The attorney's name and civil service ("GS") grade;

(b) Date when appointed;

(c) Rate of annual salary;

(d) Whether he was a veteran ("preference eligible");

(e) The number of years in which he had previously served in Government service.

13. As to each attorney appointed to the staff of the Federal Trade Commission since April 1, 1953, state:

(a) Whether letters, telephone calls, or other communications were received by any of the defendants or members of the Federal Trade Commission staff from the Republican National Committee or members of its staff in any way relating to the employment of such attorney;

(b) As to each such letter, telephone call or other communication, the name of the person to whom it was addressed, and the name of the person writing or making such letter, telephone call or other communication.

(c) Whether approval of the Republican National Committee was obtained with reference to such appointment.

You are required to answer these Interrogatories separately and fully, in writing, under oath, and to serve a copy of your answer on the plaintiff, Oliver W. Toll, 2 Newlands Street, Chevy Chase, Maryland, within 15 days after the date of the service of these Interrogatories on you. Submitted by: /s/ Oliver W. Toll
Plaintiff, Pro Se.

224 [Filed March 15, 1956]

Plaintiff's Opposition to Defendants' Motion for Summary Judgment

The plaintiff opposes defendants' Motion for Summary Judgment. Specifications as to the grounds of such opposition are stated hereinbelow.

I.

Opposition Upon the Basis of Plaintiff's Original Complaint

It appears from the Complaint and from defendants' Answer, and from the affidavits, depositions, responses to interrogatories and other material which have been filed or which prior to the date set for the hearing on the defendants' Motion for Summary Judgment plaintiff will file herein in support of this opposition, that the plaintiff has a just and legal claim and demand against the defendants, and that there are numerous genuine issues as to material facts which prevent the granting of defendants' motion.

II.

Opposition Upon the Basis of the Amendments to the Complaint

Justice requires that plaintiff's Motion to Amend Complaint, which is now pending before the Court, should be granted, and that defendants'
225 Motion for Summary Judgment should be determined in the light of the allegations contained in the amendments set forth in said Motion to Amend Complaint. It appears from the matters set forth in the Complaint, as thus amended, and from the affidavits, depositions, responses to interrogatories and other material which have been filed or which prior to the date set for the hearing on defendants' Motion for Summary Judgment plaintiff will file herein in support of this opposition, that the plaintiff has a just and legal demand against the defendants, and that there are numerous genuine issues of material facts which prevent the granting of defendants' motion.

III.

Defendants' Additional Defenses are Untenable

Neither the Answer, nor defendants' Motion for Summary Judgment, nor the attachments thereto, nor all of them together, show that plaintiff

has been guilty of laches. Neither the Answer, nor defendants' Motion for Summary Judgment, nor the attachments thereto, nor all of them together, show that the administrative proceedings taken in this case constitute any reason for denying relief to the plaintiff or constitute any defense to plaintiff's claims and demand, or constitute any reason for granting defendants' Motion for Summary Judgment. In support of this opposition plaintiff will rely upon depositions which have been filed and upon affidavits, responses to interrogatories and other material to be filed herein prior to the date fixed for the hearing.

IV.

Request for Continuance of the Hearing by the Court Upon Defendants' Motion, and for a Prior Hearing and Conference Thereon Before the Commissioner of Veterans Cases

Plaintiff requests that the hearing by the Court upon defendants'
226 Motion for Summary Judgment be continued for such time as shall be sufficient to permit the plaintiff to have a hearing and conference upon said motion before the Commissioner of Veterans' cases.

It is the intent of Rule 29 that the Commissioner of Veterans' Cases shall confer with the attorneys, endeavor to simplify the issues, settle the pleadings by any proper amendments, obtain admission of facts and documents, and otherwise promote the final disposition of the case.

Reference of the case to the Commissioner of Veterans' Cases would probably render it possible for the plaintiff also to file a Motion for Summary Judgment, thereby rendering it possible for the case to be decided without the necessity of a trial. It is not possible for plaintiff in the present state of the pleadings to move for summary judgment, because of the unconscionable denials which have been made in defendants' Answer.

V.

Objection to Exhibits to Defendants' Motion

Defendants' unsworn exhibits are not entitled to consideration upon the hearing of the motion.

Prior to the date fixed for the hearing plaintiff will file memoranda of points and authorities in support of this opposition.

/s/ Oliver W. Toll

Plaintiff, Pro Se.

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235 [Filed March 21, 1956]

OBJECTIONS TO INTERROGATORIES

Come now the defendants by their attorney, the United States Attorney, and object to the interrogatories filed herein numbered 1 to 13 inclusive and served on the defendants March 14, 1956 for the following reasons:

Rule 33 of the Federal Rules of Civil Procedure provides that objections to interrogatories may be made within ten days after the service thereof upon the party required to answer. Said rule also provides that the provisions of Rule 30 (b) of the Federal Rules of Civil Procedure are applicable for the protection of the party from whom the answers are sought. Rule 33 also provides that the interrogatories sought must be governed by the scope of Rule 26 (b). Within the meaning of Rule 26 (b) defendants herewith submit that the information sought to be obtained by plaintiff through his thirteen interrogatories contains material which is not relevant to the subject matter in the pending action and which is privileged. It is privileged because it concerns the operation of an executive branch of the government. Inquiries seeking information relative to the operations of this branch of the government, or the operation of individuals making up this branch, are privileged.

In the defendants' Motion for Summary Judgment filed herein certified copies of the documents pertaining to plaintiff together with affidavits of defendants' officers disclose that there was in the Federal Trade Commission a bona fide reduction-in-force occasioned by a reduction in funds; that according to Civil Service Commission regulations competitive levels were set up and a competitive area defined; that in accordance with said competitive area and said competitive levels specifications

Mr. Toll was properly reached for reduction-in-force. All the relevant and material documents and affidavits necessary to disposition are already in the file of the case and are ready to be argued on Summary Judgment. Any attempt to launch a fishing expedition into the operations of the Federal Trade Commission in the form of interrogatories so propounded is only aimed at harassing the defendants and impeding a government agency in the conduct of its business.

/s/ Leo A. Rover

United States Attorney
Attorney for Defendants

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238 [Filed March 21, 1956]

Notice of Taking of Deposition Upon Oral Examination

To: Leo A. Rover, United States Attorney, and Oliver Gasch, Frank H. Strickler, and Joseph M. F. Ryan, Jr., Assistant United States Attorneys,
United States Court House, Washington, D.C.

Please take notice that the deposition of Robert M. Parrish, whose address is room 426 Federal Trade Commission Building, 6th Street and Constitution Avenue, Washington, D.C., upon oral examination for the purpose of discovery or use as evidence or both will be taken Tuesday, April 3, 1956, at the hour of 10:00 A.M., at the office of Murphy, Duiker, Smith and Burwell, suite 920 Southern Building, 15th and H Streets N.W., Washington D.C., in the District of Columbia, before Elizabeth Guhring, a Notary public, or some other person authorized by law to take depositions.

/s/ Clayton L. Burwell

Attorney for Plaintiff

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Civil Subpoena

UNITED STATES DISTRICT COURT

for the

District of Columbia

Oliver W. Toll, plaintiff, vs. John W. Gwynne, et al, defendants. Civil Action No. 371-55.

To: Robert M. Parrish, room 426 Federal Trade Commission Building, 6th Street and Constitution Avenue, Washington, D.C.

You are hereby commanded to appear in the office of Murphy, Duiker, Smith and Burwell, suite 920 Southern Building, 15th and H Streets, N.W., Washington, D.C., to give testimony in the above-entitled cause on the 3rd day of April, 1956, at 10 o'clock a.m. (and bring with you) the papers and records listed on the attached Schedule A, and do not depart without leave.

HARRY M. HULL, Clerk

By John J. Flannery, Deputy Clerk (sgn.)

(SEAL)

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Schedule A [attached to subpoena]

1. All reemployment lists for attorney positions of the grade GS-11 or for attorney positions of lower grades maintained by the Federal Trade Commission since October 8, 1953.

2. The examination records of the Federal Trade Commission "Legal Review Board" or "Board of Legal Examiners" (or other board or committee functioning in that capacity) of each of the persons named on the reemployment lists mentioned in paragraph 1, above.

3. The examination records of the Federal Trade Commission "Legal Review Board" or "Board of Legal Examiners" (or other board or committee functioning in that capacity) of each of the persons appointed since October 8, 1953, to attorney positions on the staff of the Federal Trade Commission in the grade of GS-11 or below.

4. All letters, memoranda or other papers received by you since April 1, 1953, from the Republican National Committee or members of its staff regarding appointments to the staff of the Federal Trade Commission.

248 [attached to subpoena]

MARSHALL'S RETURN OF SERVICE

FOR

THE DISTRICT OF COLUMBIA

Toll v. Gwynne, Case No. CA 371-55.

Summoned the within-named by delivering a true copy of subpoena to:

Robert M. Parrish; P; 3/23/56; $4.40 tendered and accepted.

Carlton G. Beall,
United States Marshall
By Edgar J. McCoy, [signed]
Deputy

249 [Filed March 29, 1956]

REPORT AND OPINION OF COMMISSIONER OF VETERANS CASES ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff was separated from the Federal service in a reduction-in-force agency action which, not only abolished his former position of Attorney-Adviser, GS-11, at the Federal Trade Commission, hereinafter called FTC, but also through the Civil Service Regulations in effect at date of separation in plaintiff's subgroup III-A, wherein he was the only named employee in GS-11, eliminated all application of his veteran's preference rights in reassignment or reemployment, as of right requested by him, to any position for which he was qualified.

The defendants admit that plaintiff was discharged on October 9, 1953, and, though requested respectively that he has neither been reinstated, nor reassigned, nor reemployed. They admit that fellow-employees, Sloan and Hubler, Attorney-Advisers, GS-9, were in different competitive level of positions, were veterans' preference eligibles with indefinite appointments in positions excepted from competitive civil service. They further admit that no transcript of testimony was made of the hearing before the Chief Law Officer; that plaintiff's official reporter was denied permission to take notes of the hearing; that friends of the plaintiff were excluded from the hearing; and that the head of the Office of Appeals Examining, Mr. Dunton, who signed the recommended decision thereof, was not present at the hearing. In short,
250 the defendants, by their motion for summary judgment filed herein, admitting as true all the allegations of plaintiff's complaint which are well pleaded and are not merely conclusions, assert they are entitled to judgment of dismissal of the complaint as a matter of law, there being present no genuine issue as to any material fact, relied upon by plaintiff for the relief requested.

Plaintiff sets forth that (1) a conspiracy was entered into between members of the Republican National Committee and the staff of FTC to make available for appointments in the FTC, by way of Republican Party political patronage, certain positions, including that of plaintiff; (2)

John A. Delaney, an expert in reduction-in-force procedure, was appointed Director of Personnel of FTC to carry into effect, pursuant to order of the FTC Commissioners, a reduction-in-force action designed to eliminate certain groups and individuals therein who had been "particularly aggressive and effective in efforts to secure strict enforcement of the antimonopoly and antitrust laws"; (3) the retention registers were prepared so that over 40% of the attorneys sought to be reached for separation were actually listed as "low men" on their respective retention registers, including plaintiff; (4) in violation of plaintiff's reemployment rights as employee with veteran's preference, other persons, having lesser rights to employment than plaintiff, have been appointed and employed in violation of the provisions of Sections 8 and 15 of the Veterans Preference Act; (5) plaintiff was not permitted to present, on objection and ruling of the presiding officer at the hearing, evidence tending to prove that the reduction in force, as pre-arranged, was originated in bad faith and for ulterior purposes; (6) the actual interchangeability of attorneys was not effected by FTC in placing in different competitive levels and grades, attorneys, including Attorney-Advisers and Trial Attorneys; (7) the decision of the Commission was in part rested upon an ex parte unsworn statement of defendant Delaney concerning retention register positions of other attorneys to which register access to plaintiff was denied; (8) the FTC had established too many "competitive levels" of positions; and (9) Civil Service Commission regulation, 5 CFR 20.5
251 (b) (2) (1953 Supp.) in denying right to compare retention rights of employees concerned in reassignment and reemployment matters, is void.

OPINION OF THE COMMISSIONER

It should be remembered that the Supreme Court in Hilton v. Sullivan, 334 U.S. 322, held that whatever seniority rights Government employees have when discharges or reductions in force are made, depend entirely upon Congressional acts and regulations issued in harmony with them. Mr. Justice Rutledge, concurring with the majority, held that in Section 12 of the Act, there was no specific mention of length of

service. He reasoned that "while a classification which ignores all considerations both of efficiency and length of service might be found unauthorized under the statutory scheme, one which takes due account of efficiency which is not wholly unrelated to length of service, well might be sustained". He further stated that "because the language places much greater stress upon efficiency ratings than upon length of service * * * the Commission judgment that veterans with efficiency ratings of good or better should be preferred to all others could hardly be called arbitrary or in excess of the authority conferred".

The defendants heavily rely upon the Civil Service Commission's interpretation of employees' rights as resting primarily upon the type of appointment concerned. Its regulation, 20.4 (c) (3) of 5 CFR, referring to tenure subgroup III, includes employees in positions excepted from the competitive service, serving under any condition or limitation other than a conditional promotion or reinstatement or a specific time limitation of one year or less. Plaintiff accepted this indefinite appointment to office in June of 1951, with veteran's preference, and was properly placed in subgroup III-A. At the time of his separation from service, there were other employees on the retention register in his competitive level, but they were either in subgroups I-A or II-A, leaving in the lower subgroup III-A only the name of plaintiff as the low man therein. In the designa-
252 tion of competitive levels by the Agency, employees Sloan and Hubler were listed as Attorney-Advisers, GS-9 in subgroup III-A of a kindred, but different "competitive level" than that of plaintiff's, and with lower retention credit points. Plaintiff's position did not carry with it civil service status because the subgroup III specifically precluded same in that category of tenure appointments.

Plaintiff contends that the nature and character of the duties and requirements of his position and those of Sloan and Hubler were rationally the same and should not have been classified into different competitive levels because the three positions required the skilled professional ability of general attorneys, which, he contends, all three were by education and experience. Under the provision of regulation 20.5 (c) of 5 CFR,

plaintiff, with higher retention credits than Sloan and Hubler, could not properly have been separated from his excepted position when Sloan and Hubler were retained, though having lesser retention credits, had they been properly placed in plaintiff's competitive level because the duties and requirements of the positions and the occupants were interchangeable both ways without undue interruption to the work program.

Attorneys were excepted from the competitive service by regulations taking effect May 1, 1947, 12 F.R. 2839, 5 CFR (1947 Supp.) Section 6.4. Plaintiff's excepted position was abolished in the reduction-in-force action. The retention preference regulations of the Commission do not contain authority to review the Agency's decision to abolish any particular job. The Commission merely established degrees of retention preference and uniform rules for reduction-in-force actions.

In 20.2(f), 5 CFR 1953 Supp., the Commission has defined the words "competitive level", as follows:

> " 'Competitive level' means all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Generally such positions will be in the same grade or occupational level, but this is notnecessary if the other tests are met.)"

It would seem from the express definitive words of the Commission that the Court, in Langham v. RFC, 1952, 107 F. Supp. 482, was correct
253 in its holding that the separation of an employee, whose qualifications were practically the same as those of other employees on the same job who were reemployed or retained, was wrong.

It seems to your Commissioner that when the Court in the Hilton case, supra, said: "The purpose of that (Veterans Preference) Act's sponsors and of Congress in passing it appears to have been precisely the opposite—to broaden rather than narrow the preference", it meant that the Act gave legislative sanction to rules and regulations of the Commission then affecting veterans' preference in reduction-in-force personnel actions. It would seem that later regulations of the Commission that would narrow, rather than broaden, this preference, such as

that regulation pertaining to subgroup III, would not, in the Court's reasoning, have legislative sanction therefor, absent the necessary later statutory authority to the contrary. As the Congress did not define the words, "competing employees", it was the duty of the Commission to define same. This it has done, in 20.2 (c), as follows:

> "'Competing employees' for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position."

It has pertinently defined, 20.2(d), the word "qualified" to mean:

> " 'Qualified' for a position means having the basic education and experience, and such special skills and aptitudes as are necessary, to take over the position in a reduction in force and render satisfactory service without undue interruption to the work program."

Surely the Commission cannot say that attorneys, admitted to the various bars of the States and the District of Columbia, with the highest standards of all times, are not interchangeable both ways in positions, such as Attorney-Advisers, regardless of the grade and pay, between such positions, and such positions as between those classified as Attorney-Advisers group and those of the Trial-Attorney group. * * * Once the employee has been employed as an "attorney" in the Federal Service, he must be considered as fully qualified for any legal position listed in the service which does not require appointment by the President by and with the consent of Congress. * * *

I think that the Agency was in error in establishing in separate and different "competitive levels" the positions concerned herein of Attorney-Adviser, GS-9, and Attorney-Adviser, GS-11. I think that the Agency was likewise in error in establishing separate competitive levels of positions in Attorney-Adviser group and Trial-Attorney group and that all should have been included in but one retention register showing the different subgroups thereunder. The Commission has done indirectly that which it cannot properly do directly, i.e., narrow the preference of a Federal employee, paid by the Government for his civil

service duties, merely by regulating other similar positions out of plaintiff's "competitive level".

The deposition of defendant Delaney, taken at the instance of the plaintiff, is of record herein. His answers call attention to the fact that in GS-9 positions, and in grades above 9, veterans' preference does not have the same meaning in professional fields as in the non-professional. Personnel officer can pass over a disabled veteran and forget that he goes to the top of the register. In non-professional positions, the disabled veteran always goes to the top of any register. Referring to the hiring of attorneys for the excepted service, he expressed the opinion that veterans on the reemployment list have no preference which personnel officers must give them. They can pick an attorney up off the street, as far as the law is concerned, as it is not necessary to give absolute preference to veterans over any other attorney. They always appoint a veteran over a nonveteran. They review the top of the available employment register, but if they are not interested in employing the top man on that register, they do not employ him, but look at all of the ones ahead of the man they select before they make their final selection. They requested the approval of the Commission as to the established competitive levels for attorney-positions. The Commission approved the
255 competitive area but suggested change in the competitive levels, which were finally established on the interchangeability of positions, not people therein, and without bumping rights as being in the excepted service.

Whether for political reasons, or otherwise, it cannot but be noticed that the commission daily adds numerous positions to its list of excepted positions. In September of 1953, the Commission promulgated the following regulation which speaks for itself:

> "The Commission hereby delegates authority to agencies to separate indefinite employees, classified in Retention Preference Group III, in order to fill their position by separated career employees who received notice of separation by reduction in force within the preceding one-year period. Non-veterans shall be displaced ahead of veterans in the same

competitive level. Any separation under this section will be considered as having been made on order of the Commission, and will not be subject to the requirements of Parts 9, 20 and 22 of this chapter." 5 U.S.C. 631, 638. Executive Order 9830, 12 F.R. 1259, 3 CFR 1947 Supp. Paragraph (d) added, 18 F.R. 5481, September 12, 1953. Section 2.115(d). (emphasis added)

Aside from the great increase in the number of jobs excepted from the competitive service, it appears that rights of veterans under the preference provisions of the statute are being narrowed in such regulations even to the deprivation of the appeal provisions of the statute enacted for veterans' benefit. The right of appeal from agency decisions arising under Section 12 is of no lesser value than that arising under Section 14 as spelled out therein.

It is true that the rule of the Commission, that reduction in force was to be carried out in the inverse order of tenure, permanent employees to be separated last, was in effect at the time the Veterans Preference Act was passed in 1944. Section 12.304. The preference was then existing in "competing groups" and did not require being subordinated to the Act of 1944. As Section 864 controls reemployment preferences, the employee must first make request therefor. A violation thereof occurs only if the officer fails to follows the procedures of Sections 856 and 857 of 5 U.S. Code, and other regulations. Reinstatement means reemployment of a person upon formal request of the appointing officer. 1 Fed. Reg. 602, 5 CFR 9.1, 9.101 (1939). When such matters occur in the administrative proceeding, which is nonjudicial, the courts should
256 be sensitive to the citizens' rights because of the difference in securities in the judicial over administrative action, and where there is doubt, it should be resolved in the citizen's favor. United States v. Scott, 137 F. Supp. 449, 455.

I think that the lengthy allegations of plaintiff relative to the conspiracy of the FTC officials, prior to the reduction-in-force, during the same, and thereafter, are without merit as reason for judicial relief.

* * * * * * *

The provisions of 5 U.S.C., Sec. 631, authorize the President to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof. Complete control over the admissions does not obviate the removal requirements of the Lloyd-LaFollette Act. That this is so has been held by our Court of Appeals in Roth v. Brownell, Jr., 215 F.2d 500, 502.
258 The Court there held that neither the formula of "excepting" the kind of position a persons holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that, "No person in the classified civil service of the United States shall be removed . . . therefrom" without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear. Further emphasis of this Congressional limitation on the executive is found in the amendment to Section 6.4 on June 25, 1953, 18 F.R. 3655, as directed by Executive Order 10463 pertaining to the removal of incumbents of excepted positions. The regulation now reads:

> "Removal of incumbents of excepted positions. Except as may be required by the Veterans Preference Act, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedule A and C or from positions excepted from the competitive service by statute." (emphasis supplied)

It is clear and persuasively controlling that an administrative rejection of an alleged claim against the United States is conclusive when Congress has chosen to make it conclusive, United States v. Babcock, 250 U.S. 328, and similarly as to officials of the Government when Congress has specifically withdrawn from the courts all jurisdiction to review the decisions of such officials relative to compensation claims in the Veterans Administration, Sections 705 and 11a-2 of Title 38 U.S. Code, even if arbitrary and capricious, Hahn v. Gray, U.S. App. D.C., 1953, 203 F.2d 625. But Section 12 does not contain any express words relating to judicial review of agency decisions thereon. Congress merely states the boundary limitations within which Commission rules and regulations shall be promulgated. The Supreme Court's duty was to interpret the

meaning and the intent of Section 12 and held that rules and regulations of the Commission were valid when, and then only, they did not narrow the preference of veterans. Fass v. Gray, 1952, 91 U.S. App. D.C. 28, 197 F.2d 587, cert. den. 344 U.S. 839, teaches that a Civil Service Commission regulation that employees, who cannot be retained in their positions because of reduction in force, shall be reassigned to continuing positions, furloughed, or separated, and that reassignment is required in lieu of separation or furlough within the local commuting area, without
259 interruption to pay status whenever possible, to an available position for which employee is fully qualified, unless a reasonable offer of reassignment is refused, was valid as to veteran. I think that the Commission in establishing the tenure groups, 20.4(c), has narrowed the preference in veterans in Group III by prohibiting reassignment rights therein, but grants such rights to incumbents in Groups I and II, the career groups. The Whitten Amendment, Public Law No. 253, 82d Congress, as amended, does not direct any curtailment of such preference. The Commission promulgated these tenure groups upon the enactment of the Whitten Amendment and with both tenure of employment and veterans' preference in mind. I think that the Commission is in error in withdrawing reassignment rights from Group III in a reduction-in-force action because such regulation narrows the preference of veterans, whether in the competitive classified civil service or not. See amendment to 5 CFR, Section 20.4(c); 5 U.S.C. 860, 868; 21 F. R. 1847, March 27, 1956.

I think that the motion of the defendants for summary judgment should be denied and this case set down for hearing on the merits solely on the issue raised by plaintiff's allegations as to the interchangeability of the positions of plaintiff and those of employees Sloan and Hubler and the reassignment retention rights of each therein. I think that all evidence should be excluded as to the allegations of conspiracy and the ensuing alleged bad faith therefrom arising, on the authority of the Gregoir case, supra, as immaterial.

CONCLUSION

For the reasons stated and the authorities cited, I recommend

that defendants' motion for summary judgment be denied.

Respectfully submitted,
/s/ John Henry Sullivan
Commissioner of Veterans
Cases

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260 [Filed March 29, 1956]

Reply to Objections to Interrogatories

Comes now the plaintiff, by Clayton L. Burwell, his attorney, replying to defendants' Objections to Interrogatories and shows to the Court:

Defendants have impeded the progress of this action by defaults in the filing of their Answer aggregating approximately 9 months. They are now seeking to have their Motion for Summary Judgment hurried on for decision, at the same time that they are delaying proceedings intended to give the Court a fair basis for its determination of the motion. The vague character of the defendant's Objections to the Interrogations, and the wholly perfunctory character of their Memorandum of Points and Authorities in support, make it evident that the Objections are merely a tactical move designed to stall off answers to the Interrogatories for long enough to prevent their consideration by the Court in ruling on the Motion for Summary Judgment.

Defendants' Objections to the Interrogatories are limited to the assertions: (1) That the information sought to be obtained "contains material which is not relevant", and (2) that all information relative to the operations of the executive branch of the Government is privileged.

261 1. Relevancy

This question requires reference to the claims asserted in the complaint. Plaintiff asserts that the reduction in force proceeding conducted in September and October, 1953, by the then Chairman of the Federal Trade Commission was a fraudulent evasion of the Veterans' Preference Act, an attempt, in violation of the statute and

and of the civil service merit system, to create job vacancies to be used for patronage appointments; that the illegality lay both in the fradulent inception of the proceedings in the absence of any real justification for a reduction in force, and also in the fraudulent methods by which the selection of personnel for discharge was made; that the reduction in force was falsely alleged to be necessary for budgetary reasons but in fact was unjustifiable on budgetary grounds; that in conducting the reduction in force the fragmentation of personnel was falsely asserted to conform to the Federal Trade Commission's operation, but in truth did not conform to the facts; and that after plaintiff's illegal discharge his statutory rights under the Veterans' Preference Act to reemployment were violated by passing over the plaintiff and hiring others contrary to the requirements of the statute.

These claims present highly factual issues. The Interrogatories concern facts bearing upon those issues. If true answers to them can be obtained we believe that they will show: Question 1: that the personnel of the Federal Trade Commission was first reduced by reduction in force proceedings and then largely or wholly restored to its original level within the same fiscal year, a fact inconsistent with the alleged budgetary necessity for a reduction in force. Questions 2 and 3: that the ceiling on payroll expenditure over the fiscal year which was alleged to be necessary was not in fact carried out. Questions 4 and 5: that the justification for the reduction in force was wholly invalidated by its omission of the element of "attrition".

Questions 6 and 7: whether the action taken under the reduction
262 in force coincided with action proposed in the justification. Questions 8, 9, and 10: that the reduction in force was not necessary for the purpose of economy. Question 11: that the reduction in force was utilized to make possible new appointments immediately prior to and during the same fiscal year. Question 12: that the plaintiff's rights of reemployment were violated by passing over the plaintiff and appointing others, over whom the plaintiff had peremptory priorities. Question 13: that the entire program of substitution of existing personnel

by new appointees was made in order to supply the Republican National Committee with the patronage appointments.

Plaintiff submits that the Interrogatories are relevant.

2. Privilege.

Defendants' position on this point is simply the absurd sweeping claim that all operations of the executive branch of the government are privileged.

It is not claimed that the information is inherently of a secret or confidential character. Nor is this a case where Government files are sought to be made available in a case in which the Government is not concerned.

In this case the points in dispute are necessarily within the knowledge of government officials. To deny plaintiff access to the information would in effect deny him access to the Courts.

* * * * * *

3. The Objections are too General.

Mere general objections, such as those made here by the defendants, are not sufficient.

2 Barron & Holtzoff, Federal Practice, Sec. 775

4. Request that Prompt Answers be Required.

Under the circumstances of this case, and since no substantial objection has been made to any of the Interrogatories, defendants should
263 be required to answer the Interrogatories in time so that the Court may consider those answers in connection with defendants' Motion for Summary Judgment. The rules contemplate that on such a motion there shall be a genuine opportunity to present any relevant facts for the Court's consideration. Thus, Rule 56 (e) specifically provides for further testimony, stating that the Court may permit the affidavits (submitted in connection with the hearing on the Motion for Summary Judgment) to be supplemented by depositions or by further affidavits. That provision indicates that a motion for summary judgment is not to be approached as a procedure by which a case may be eliminated upon the basis of some technical defect of pleading, but rather that the ruling

shall constitute a fair appraisal of the merits of the claim and defense.

If it is proper in the interest of justice to continue a hearing on a motion for summary judgment for the obtaining of further testimony, a fortiori prior to the hearing the parties should have every reasonable facility for presenting relevant evidence which may bear upon the merits of the action or the existence of genuine issues of material fact.

Defendants were served with the Interrogatories in question on March 14, 1956. Their objections were filed March 21, 1956, seven days later. It is submitted that defendants should be required to answer the Interrogatories within 8 days after the Court's ruling on the objections, which will allow defendants their full 15 days for answering the Interrogatories and still permit the answers to be before the Court in connection with defendants' Motion for Summary Judgment.

/s/ Clayton L. Burwell
Attorney for Plaintiff

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270 [Filed April 5, 1956]

Motion for Continuance of the Hearing on Defendants' Motion for Summary Judgment, to Compel Robert M. Parrish to Appear for the Taking of His Deposition, and to Require Defendants to Answer Interrogatories

Comes now the plaintiff and moves the Court for an order: (1) continuing the hearing on defendants' Motion for Summary Judgment until after the deposition of Robert M. Parrish, an employee of defendants, shall have been taken and filed, and until the Interrogatories heretofore filed by the plaintiff in this action shall have been answered: (2) compelling said Robert M. Parrish to appear for the taking of his deposition upon oral examination at some reasonable time and place to be fixed by the Court; and (3) compelling the defendants to answer the Interrogatories.

For reasons for this motion, plaintiff shows to the Court:

(1) Continuance of the Hearing on Defendants' Motion for Summary Judgment

On or about March 6, 1956, defendants filed in this action a Motion for Summary Judgment which has been set for hearing on April 23, 1956. Plaintiff has sought to make available to the Court upon the hearing of said motion, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, relevant matters by way of deposition of
271 Robert M. Parrish and by interrogatories. Defendants unjustifiably caused said Robert M. Parrish to fail to appear for the taking of his deposition and failed to answer said Interrogatories, rendering it impossible to make the information to be obtained therefrom available to the Court upon said date. Had said Robert M. Parrish appeared as required for said deposition and had defendants answered said Interrogatories within the time specified therefor, such information would have been available for consideration by the Court at the date set for the hearing of the Motion for Summary Judgment, April 23, 1956.

The information to be obtained is relevant to the merits of said Motion for Summary Judgment and it would be prejudicial to plaintiff to determine said motion before the deposition of Robert M. Parrish is filed in this action and until the answers to said Interrogatories are made.

(2) Deposition of Robert M. Parrish

On March 21, 1956, plaintiff served on attorneys for defendants a notice of the taking of the deposition of Robert M. Parrish at the hour of 10:00 A.M. April 3, 1956, at Suite 920, Southern Building, Washington, D.C. Service of a subpoena duces tecum for attendance at said time and place for the purpose of taking said deposition was duly made upon the said Robert M. Parrish by the United States Marshal on the following day, March 22, 1956. Said Robert M. Parrish is an employee of the Federal Trade Commission, who are defendants in this action, and is under the direction and control of said defendants. Although defendants had thirteen days notice of the taking of said deposition, they failed to obtain any order of Court quashing or continuing said deposition.

272 Plaintiff appeared at the time and place set for the said deposition, together with a notary and a reporter prepared to take said deposition. As appears from the report of the Notary before whom said deposition was to be taken, which report is filed in this action, neither said Robert M. Parrish nor attorneys for defendants appeared for the taking of said deposition but willfully absented themselves, without authorization by order of Court or any warrant whatever. Plaintiff asks that said Robert M. Parrish be required to give his deposition in time to be considered by the Court in connection with the hearing on the Motion for Summary Judgment.

(3) Answers to Interrogatories

On March 14, 1956, plaintiff filed interrogatories in this cause and on the same day served a copy thereof on attorneys for defendants. On March 21, 1956, defendants filed objections to said Interrogatories, which objections were wholly untenable and interposed for delay. Plaintiff has replied to said Objections. Plaintiff asks that said Objections be overruled and that defendants be required to answer the Interrogatories prior to the hearing on the Motion for Summary Judgment.

Wherefore, plaintiff prays for an order as hereinabove specified.

/s/ Clayton L. Burwell
Attorney for Plaintiff

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274 [On April 5, 1956, plaintiff filed the certificate of Elizabeth Guhring,
275 Notary Public, to Mr. Parrish's nonappearance at the time and place
277- set for deposition. Plaintiff also filed an opposition to defendant's
279 motion to quash subpoena to Mr. Parrish and postpone his deposition.]

817 **CONDENSED STATEMENT IN NARRATIVE FORM OF THE TESTIMONY OF JAMES A. HORTON, GIVEN FEBRUARY 24, 1956, BEFORE ALFRED F. GOLDSTEIN, NOTARY PUBLIC**

* * * I was Director of the Bureau of Industry Cooperation, in which the plaintiff in this case was employed, during the period of the reduction in force held in the latter part of 1953.

818 I have served on the Board of Legal Examiners of the Federal Trade Commission. * * * The duties of that Board was to hold examinations for lawyers who had filed application for appointment to the Federal Trade Commission. Following their applications they were notified to appear before the Board, at which time a thorough and rigorous examination was made of their qualifications, character and other factors. I began to serve on that board from its institution * * * I think I remained a member of the Board of Legal Examiners until after Chairman Howrey's appointment. But I do not know whether we functioned after his appointment or not. That Board did function up to the time of his appointment. * * * There was a change of the administration when Mr. Howrey was appointed Chairman. Until the time that Mr. Howrey was appointed Chairman, on a permanent basis, the Commission had the practice of rotating the Chairmanship yearly, so that there were numerous changes of Chairmanship during the period I was on the Board of Legal Examiners. * * * In some of those cases there would be a Republican who would be the Chairman, and others who would be a Democrat. * * * The Board functioned comparatively continuously and without changes of personnel during various changes of administration in the Commission, and during a period of years, the extent of which I cannot recall, from the time of its beginning.

I can't answer the question what happened to the Board of Legal Examiners when Chairman Howrey became Chairman of the Commission. I do not know what happened to it. I just was not called upon to serve on the Board. I did not receive any notice to the effect that I was no

longer a member. * * * I cannot answer more explicitly. * * *

I do not know what became of the Board of Legal Examiners in which I served. I never heard of its being abolished. I retired on June 30, 1955. That was a period of approximately 2 years and 3 months from the time that Chairman Howrey became Chairman. During that period I think new employees were taken onto the staff of the Federal Trade Commission although I am not positive. I don't recall that I was consulted as to the employment of any such new employees during that period of 2 years and 3 months. Under the procedure followed by the then Board of Legal Examiners, each applicant
820 was examined and given a rating, and the register was established showing the rating of each particular applicant who had been examined. I have no knowledge by what process were those new employees selected after Chairman Howrey took office. * * *

821 I had little or no connection with the reduction in force in the period indicated. The only thing that I can recall is that Mr. Delaney stated in my office one time that in the course of the reduction in force which the Commission was undertaking that it might be necessary to dismiss Mr. Toll from the service. I can't recall of any other conversations with Mr. Delaney. I cannot recall any telephone conversations with him about the general subject of the reduction in force. I did not receive any memoranda fromhim about that general subject, that I recall. I can't recall that I received any such memoranda. I may have. I do not have any faint recollection of such receipt. My memory might be faulty in the matter. I cannot recall ever having written Mr. Delaney on the subject of the reduction in force. I did not write anyone else on that subject, to the best of my recollection and belief. All that I can recall is the one conversation with Mr. Delaney on the subject. I can't recall that I had any conversations with Mr. Parrish on the subject. * * * I did not have any conversation with Chairman Howrey on that subject. I did not have any conversation with Mr. Murchison on that subject that I recall. I did not have such conversations with Mr. Akerman.

Q. Did you receive any memoranda from any of the persons whose names I have mentioned on the subject? A. The only thing
822 that I recall is that I was called up and told that there was a sealed letter being delivered to me with instructions that I deliver that letter to Mr. Toll, which I did. It was Mr. Delaney's office that called me and told me that. I don't recall that I made any recommendations about anyone in my Bureau relative to the matter of separation. I do not recall that my recommendations were solicited on that subject. Prior to the conference with Mr. Delaney which I mentioned, I did not have any prior conferences with any of the persons I have mentioned on the subject of the reduction in force, that I recall. None of them called on me to describe the operations of the Bureau, because the operations of the Bureau were delineated and well known. I don't believe they would have had any occasion to call on me to describe its operations. Offhand, I don't recall that they did call on me to describe its operations. I have already answered the question whether I recall any conference which I held in Mr. Parrish's office on the subject of reduction in force or preparations for it; and the answer is that I do not recall that I did. To summarize: I did have one conference with Mr. Delaney, in which he said that it might be necessary to separate Toll from employment; I do not recall any other conversations, telephone calls, or memoranda to or from me, aside from that, with relation to the reduction in force or the preparations for it. * * *

823 I did not have anything to say as to which men should be separated. I can't describe the conversation in which Mr. Delaney spoke of separating Toll better than what I have previously. He came into my office, and stated that in the reduction in force which the Commission was undertaking that it might be necessary to separate Mr. Toll from the service. I can't recall that he explained why he was telling me that. My response was, I said there was nothing I could do about it.

Q. But you would say that you did not in any way select Toll for separation? A. I don't recall that I ever selected anyone for separation.
* * *

824 There were approximately 25 or 26 attorneys in my Bureau at that time, around that number. They started from GS grade 7 and went up to 16. The general function of the attorneys in my Bureau were to preside at trade conference hearings, to prepare reports on those hearings, to evolve a set of trade practice rules, and to make recommendation to his superior officer as to what would be included or excluded in the rules, together with his reasons therefor. Also some attorneys devoted themselves to securing enforcement of a law as expressed in the trade practice rules through cooperative procedures. These functions were assigned to the different attorneys based on their training and experience and their adaptability to the particular line of work. There was some inequality of training, experience and adaptability among the attorneys. I would say that would be true in any organization. It did not necessarily correspond with their grades for salary purposes. I would assign the work from the duties which were delineated in his job description sheet, I endeavored to do that. * * * I would say that, in the ordinary course of events, jobs were sometimes transferred from one attorney to another. I would presume that at times they might be transferred from an attorney in one grade to an attorney in a different grade. * * *

825 Exhibit B marked for identification is a memorandum over the signature of O. L. Hunt transferring a number of what were known as cosmetic cases previously assigned to Mr. Patton and Mr. Toll, to Mr. Toll. That appears to be Mr. Hunt's signature. I can't recall whether Mr. Patton and Mr. Toll had the same grade. * * * I would say in the normal course of the procedure Mr. Hunt had the authority to effect this transfer of cases from one attorney to another in that Bureau. * * * I always maintained we were under-graded. I think our grades should have run from 9 to 14 at least. * * *

826 I recall quite definitely the cosmetic survey that was conducted. * * * The attorneys assigned to that were varying grades. I can't recall specifically.

I do not know the system or the formula for the selection of attorneys to be dismissed which was established and used by the Commission in the reduction in force. I can answer the question whether as a practical matter much of the work of the Bureau could be transferred from one attorney to another even though they were of different grades by stating that it would depend upon the nature and complexity of the particular matter which would be reassigned. Under the stress of operational necessity, there could have been many transfers between attorneys of different grades. There were a number. I don't know the exact number, but in the desire to complete our work there were transfers at times. Whether an attorney could be transferred from the group which formulated rules to the group which dealt with enforcement, or vice versa, would depend upon the man's characteristics, his manner of approach, and other factors which must be taken into consideration if you would consider making such a transfer. * * *

I presume in the natural course of events you could have formulated groups of attorneys where you could say this group is relatively interchangeable among themselves as for work functions, but I never found it necessary to do so. As I stated, I always endeavored to assign work according to the qualifications of the man and his
827 duties as described in his job description sheet. I endeavored to do that. At all times I endeavored to avoid any possible criticism in assigning or reassigning work, endeavoring to keep the work within the channels such as I described. Whether we did that at all times I can't say. I can't answer the question whether or not attorneys in one grade are interchangeable with attorneys in another as a practical matter, because there are too many equations involved in the matter. I can't answer from memory approximately how many grade 9 attorneys there were in the Bureau. I think the greatest number of attorneys were probably in grades 9, 12 and 13. I don't believe we had any Grade 11.

Q. If some positions had to be cut, what grade would you select for cutting in view of the necessities of the Bureau?

Mr. Ryan: I object to this question for the same reason. It is not eliciting facts that this witness has knowledge of, as calling for opinions on the part of the witness in an area where he said he had no experience and no connection with the reduction in force and no connection with the selection of those who were to be reduced in force.

The Witness: I decline to answer the question. * * *

Q. Did anyone ever talk to you about there having been demands that positions for appointment be made available? A. Not to me, no.
828 Again I refer you to the fact that the only thing I ever heard where these latrine rumors. That would be idle conversations between men. The substance of such conversations was that an effort was being made to secure positions. * * *

As I have testified, I received a sealed envelope with instructions to deliver it to Mr. Toll, which I did. I am under the impression that Mr. Toll later told me that that envelope contained a letter of dismissal of Mr. Toll. I never saw the letter itself. I did not see the notices themselves in any other case.

ON CROSS-EXAMINATION

In the list of cases in Exhibit B for identification, signed by Mr. Hunt, there were several very important cases, of a more or less complex nature. * * * The highest rated attorneys were all in the Trade Practice Conference Division. * * * Mr. Toll was within that division. Mr. Hall was one of the attorneys who had high grades in that position. I would not say that I could transfer all of Mr. Hall's cases to Mr. Toll,
829 based on the fact that Mr. Toll had not had the broad experience that Mr. Hall had. For that reason the positions would not be strictly interchangeable.

ON RE-DIRECT EXAMINATION:

I would say it might be possible to transfer a case from Millspaugh to Toll. * * *

If you were to tell me that a case was transferred from Combs to Yarley, it would be a transfer that would be acceptable to me. Whether the same case from Yarley to Toll would be a reasonable transfer

would depend on the nature and complexity of the case, based on the experience you had with the Commission. The case of Angelique and Company, Inc. means nothing to me. If you are asking if I were to approve a transfer from Yarley to Combs, in the case of Vi-Jon Laboratories, Inc., it would be subject to my opinion as to whether that could be properly handled in such a transfer. I would not say that it could not be. Not recognizing the case of Germaine Montail Company, and in view of the fact that we had two or three hundred of those cases, I cannot answer whether that case could be transferred from Patton to Combs. * * *

830 Whether cases could be transferred from Hall to Toll would depend on the nature and complexity of the case. It might well happen that cases could be, if I considered that Toll's experience was sufficient to handle the matter.

/s/ James A. Horton
[Notary's certificate]

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327 [Filed April 11, 1956]

ORDER

The above-entitled cause having come on for hearing on plaintiff's motion for (1) continuance of hearing on defendant's motion for summary judgment, and (2) to compel the appearance of Robert M. Parrish at a deposition, and (3) to compel answer to interrogatories filed herein March 14, 1956, and on defendants' opposition to the motion in its entirety, and it appearing to the Court that the matter sought to be elicited by way of interrogatories would be completely immaterial to the cause of action and vexations to the defendants, and it further appearing that the information sought to be elicited of Robert M. Parrish, Secretary of the Federal Trade Commission, by way of deposition would also be of a nature immaterial to the cause of action and also vexatious to the defendants, it is this 11th day of April 1956

ORDERED that plaintiff's motion to continue the hearing on summary judgment set for April 23, 1956 herein be and hereby is denied,

FURTHER ORDERED that plaintiff's motion to compel the appearance of Robert M. Parrish for deposition be and hereby is denied, and

FURTHER ORDERED that plaintiff's motion to compel defendants to answer interrogatories propounded March 14, 1956 filed in this action be and hereby is denied.

/s/ James R. Kirkland
Judge

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758 **CONDENSED STATEMENT IN NARRATIVE FORM OF THE TESTIMONY OF AUSTIN H. FORKNER GIVEN MARCH 26, 1956, BEFORE HENRY M. KUZNIAR, NOTARY PUBLIC.**

* * * Mr. Forkner: I want the record to show that I am appearing here in response to a subpoena. * * *

759 On September 4, 1953, I received a notice terminating my services as an employee of the Federal Trade Commission as of October 6, 1953. * * * The reason given in the notice was a reduction in force program for budgetary reasons. I think 50 or 60 employees received notices and some 37 lost their positions. I believe it was the same reduction in force program in which the plaintiff in this case was also separated from employment.

I attended a hearing on or about March 2, 1954, in the Civil Service Commission Building in regard to an appeal by the plaintiff in this action from his separation under the reduction in force program. At that time I was not an employee of the Federal Trade Comission. * * *

760 I think after the witnesses were ejected from the room, which was myself and one other, or requested to wait outside, that the suggestion was made that since I was familiar with some of the proceedings I should assist Mr. Dawson, and I did do so. I am an attorney-at-law. * * *

761 The plaintiff protested that the absence of a record would constitute a handicap to him in obtaining his vindication of his rights in

the courts. * * * There was quite a little argument about it by the plaintiff and his counsel, stating in general that they were handicapped in preserving the record. There was something mentioned about an investigator's report. * * * Mr. Valentine replied, as I recall it, that the material in question was an investigator's report, and in the nature of an interoffice memorandum, and as such could not be made public. There was considerable protest to that by the plaintiff, and I believe by his counsel. * * *

763 The hearing is difficult to relate because there were several parties talking generally at the same time, and interruptions and so forth, but, as I best recall it, the appellant and his counsel attempted to present evidence to the effect that the reduction in force was not based upon any financial necessity. Questions were put on that, objections were made and sustained. Other questions were presented as to whether it was conducted in good faith or bad faith for the purpose of creating job vacancies which could later be used for patronage appointments. Again, objections were made and sustained. As I recall it, the hearing examiner refused to permit the submission of this evidence, stating that the Civil Service Commission had no jurisdiction to review the correctness of an agency's claim as to its reasons or the basis of conducting a reduction in force. In general, he stated that a reduction in force program could be made for any reason or no reason, and that in the present case it made no difference whether or not it really was made for budgetary reasons. I think both counsel, Mr. Dawson, and the plaintiff also protested that ruling very vigorously and it occurred several times during the hearing. * * *

The plaintiff stated that he had not been permitted to examine the retention register which had been prepared for the reduction in force program. I think Mr. Hardesty asked the plaintiff whether or not he had stated to some Civil Service investigator that he did not wish to see it, and the plaintiff answered in the negative, that he had not made
764 such a statement. * * * I think at that time plaintiff and Mr. Dawson

insisted on plaintiff's right to see all the evidence that came before the hearing examiners of the Civil Service Commission, which included those investigative reports. As I recall it, that was not permitted. * * *

765 Questions were put to Mr. Delaney on the point as to whether correspondence indicated advance approval, and I believe it was ruled to be immaterial and irrelevant, and then, as I recall, I believe one of the hearing examiners made the gratuitous remark that, from looking at the papers, they did not indicate that there had been any approval, and that that was outside of the domain of the Civil Service Commission or their power or authority. The plaintiff was not permitted to see the papers, and I didn't know what they related to, either. * * * The ruling on that request was, that was in the category of the investigator's report, the nature of an interoffice communication between the Civil Service Commission and the Federal Trade Commission. The ultimate ruling on the question was, irrelevant and immaterial. The plaintiff was not permitted to see them.

Questions were asked by plaintiff and his counsel as to transfers of attorneys within the Federal Trade Commission from one function to another, from one bureau to another. According to my best memory, the ruling was made by the hearing officers that such transfers of attorneys shortly before and during a reduction in force could not be gone into; that such matters were entirely within the discretion and the judgment of the employing agency. * * * I think the hearing officers

766 made the comment that such transfers were not uncommon; that many of them occurred while a reduction in force was going on in the agency, and that there was nothing that the Civil Service Commission could do to prevent or affect the outcome of a reduction in force program where such transfers had been made, no matter what the motives might be for them. I think the purpose of the questions was along the line that such transfers might affect the selection of the people to be separated; and the ruling was adverse, that it could not be gone into.

As I recall it, various attempts were made by the plaintiff and his counsel to show that there was a wide interchangeability of attorneys

and functions in the Federal Trade Commission; that these competitive levels that had been established by this particular agency were much more narrow and smaller than the facts would justify. I recall that such evidence was ruled out, it was not material. I think Mr. Valentine ruled that the Civil Service Commission would decide that independently, and if they felt it necessary and needed more evidence on that point, they would send their investigator over to find out the facts, and they would decide the question. * * *

767 There was an attempt to introduce evidence on the plaintiff's contention that the reduction in force was aimed at specific individuals. * * * I believe that Mr. Valentine stated in substance at different times during the hearing that there was no rule that an agency could not have a reduction in force program in order to reach certain specific persons, and I think he added that the Civil Service Commission had no jurisdiction to inquire into such questions as to the good faith or the bad faith of the agency, that it made no difference since it was a purely administrative matter. He stated further that it was the general practice of the agency heads to list persons to be reached in a reduction in force program, that the Civil Service Commission could not question the method of selection, and so forth. * * *

769 It was stated several times that the plaintiff was not getting the sort of hearing or the sort of appeal to which he was entitled under the Veterans Preference Act and under the Constitution. It was thoroughly stated by him and his counsel. The due process objection went to all of the exclusions, and it also went to certain specific exclusions as they occurred, while the rulings, or right after the rulings, were made. * * *

773 ON CROSS-EXAMINATION

* * * In respect to the investigator's report, I think the point was made that a party has a right to confrontation of opposition witnesses and to the right of cross-examination as a matter of primary judicial right. * * * I think they cited the same general rule or regulation or practice that all matters coming before a judicial or quasi-judicial body

should give all parties equal opportunity of testing the validity or the basis of the information. * * *

776 I am merely relating what happened. Apparently, if there had been a stenographic report there, witness's testimony would not even have been necessary, because my testimony so far has related entirely to what occurred.

* * * * * *

Q. I want to ascertain whether or not at any time during this administrative hearing there was an issue raised by the plaintiff which was just left in a vacuum without any reason for ruling being given. A. Well, I can sum it up by saying that almost everything
777 that the plaintiff attempted to present was ruled out. I don't know of anything that went into the record except as to what point in the register he was. * * * I think everything else was ruled out as being either without Civil Service Commission jurisdiction or being irrelevant or immaterial and I think that Mr. Toll and his counsel several times referred to their constitutional rights being violated. * * *

ON REDIRECT EXAMINATION

I think that the precise basis for the constitutional objection was
778 given. The Fifth Amendment was among those mentioned, as I recall. The reasons given for the exclusion of evidence included the proposition that the Civil Service Commission was looking after the plaintiff's rights. * * *

* * * * * *

/s/ Austin H. Forkner

[Notary's certificate]

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497 [Filed April 20, 1956]

"Dawson Affidavit A"

Affidavit

Claude L. Dawson, being first duly sworn, on oath, deposes and says:

Affiant represented Oliver W. Toll, the plaintiff in this action, at

the Civil Service Commission hearing which was held March 2, 1954, on the appeal taken by Oliver W. Toll from his separation from employment by the Federal Trade Commission, under reduction in force proceedings in September and October, 1953.

Mr. Toll was accompanied at the hearing by Mr. Austin H. Forkner. There was also present a shorthand reporter who attended at our request in order that we might have a transcript of the proceedings which occurred at the hearing. As representing the Civil Service Commission there presided at the hearing Leroy W. Valentine, "Reduction in Force Adviser", assisted by John O. Hardesty, an "Appeals Examiner".

At the beginning of the hearing I inquired whether a transcript of the proceedings would be taken down by anyone appointed by the Civil Service Commission for that purpose, and the persons presiding answered that no such transcript would be made. I then stated that Mr. Toll, the appellant, had brought a stenographer for the purpose of making a record of the testimony in case no official transcript was made, explaining that Mr. Toll felt that he was entitled to have a record of the proceedings
498 which occurred. The persons presiding stated that the stenographer would not be permitted to make a record of the proceedings and would not be permitted to remain in the room. The appellant protested that the absence of a record would constitute a great handicap in obtaining an adequate review of the proceedings in the Courts; and that a proceeding without a proper record failed to give a veteran the appeal rights to which he was entitled under the Veterans Preference Act. The persons presiding stated that the Civil Service Regulations forbade such a record being made, but, although requested by the appellant, they failed to cite the regulation prohibiting such a record. Mr. Valentine stated that the Civil Service Commission accepted responsibility for obtaining all the facts and arriving at a correct decision. The appellant replied that he did not regard the Civil Service Commission as the proper representative of his rights.

At the outset of the hearing Mr. Toll requested that he be permitted to examine the report of the Civil Service investigator, which, he understood had been made on his case. Mr. Valentine replied that the material in question was an investigator's report and could not be examined by the appellant.

The persons presiding required that all persons except the appellant and his attorneys, and representatives of the Federal Trade Commission, leave the room, and that witnesses wait in the hall until called. Mr. Forkner remained for the purpose of assisting the appellant as additional counsel. The manner in which the hearing was cleared of any audience and the lack of reasonable accommodations for witnesses gave an impression that the appellant and his witnesses in the appeal were disapproved.

During the course of the hearing the appellant attempted to present evidence to the effect that the reduction in force was not based upon any financial necessity, but was conducted in bad faith and for the purpose of creating job vacancies which could later be used for patronage
499 appointments. Mr. Valentine refused to permit the submission of such evidence and stated that the Civil Service Commission had not jurisdiction to review the correctness of an agency's claim as to its reasons and basis for conducting a reduction in force. He said that a reduction in force could be made for any reason or no reason, and that in the present case it made no difference whether or not it was really made for budgetary reasons.

At the hearing the appellant testified that he had not been permitted to examine the retention register which had been prepared by Mr. Delaney for the reduction in force. Mr. Delaney was present when Mr. Toll gave that testimony and did not attempt to contradict the appellant on that point. When Mr. Toll said that he had not been permitted to examine the retention register, Mr. Hardesty, looking up from papers which he was examining, asked Mr. Toll whether he had not stated to the Civil Service investigator that he did not wish to see it. Mr. Toll answered that question in the negative. Mr. Hardesty

received Mr. Toll's testimony with an appearance of incredulity and stated that the Civil Service Commission's record showed otherwise. The appellant asked to see the so-called "record" on that point. The request was refused.

* * * * * *

The appellant attempted to present evidence as to transfers of attorneys which had been made shortly before the reduction in force from one position to another, and to show that such transfers had been made for the purpose of arranging the competitive levels in such a manner that certain attorneys could be reached in the reduction in
500 force and that others could be saved. The persons presiding at the hearing ruled that such matters could not be gone into. They further stated that such transfers were not uncommon, that they were sometimes made while a reduction in force was going on, and that there was nothing that the Civil Service Commission could do to prevent an agency from affecting the outcome in a reduction in force by means of such transfers, whatever the motives for such transfers might be. It was attempted on behalf of appellant to introduce evidence that in the past there had been wide interchangeability of attorneys in various functions of the Federal Trade Commission, and that the arrangement of competitive levels which had been used in the reduction in force did not correspond to the actual facts of the situation in the Federal Trade Commission, but that the competitive levels which had been established were much narrower and smaller than the facts would justify. Appellant's counsel was cut off from presenting such evidence. Mr. Valentine stated that the question whether the competitive levels were properly established was a matter which the Commission would decide independently, and that, if the Commission felt that it needed further evidence on that point, it would send an investigator to determine it.

It was attempted on behalf of the appellant to introduce evidence that the reduction in force proceedings were conducted largely for the purpose of reaching and discharging specific individuals. Mr. Valentine cut off evidence to that effect, saying that there was no rule

that an agency could not have a reduction in force in order to reach specific persons, and added that the Civil Service Commission had no jurisdiction to inquire into such questions, and that good faith or bad faith in conducting a reduction in force made no difference, since it was an administrative matter. He stated that it was a common practice for agency heads to list persons to be reached in a reduction in force and that the Civil Service Commission could not question that method of selection.

501 It was attempted on behalf of appellant to introduce evidence that in the reduction in force, contrary to the requirements of the Federal Trade Commissioners as a whole (as distinguished from the Chairman of the Commission), the cut in personnel had been unequally distributed as between the various bureaus. That line of evidence was forbidden, and Mr. Valentine directed appellant and his counsel to confine themselves to questions as to which the Commission had jurisdiction. It was answered that the unequal distribution of the cuts between the bureaus had a bearing on the matter of good faith. Mr. Valentine's reply to that was that the Civil Service Commission was not in a position to give consideration to the matter of good faith.

By numerous exclusions of evidence and through cutting off questions, the persons presiding at the hearing in question in effect limited the appellant in presenting evidence to the single question of his relative retention rights as against those of other persons who had been placed in the same particular competitive level as the appellant, and excluded all other matters of inquiry. To all of those exclusions of and narrowings of the field of inquiry objections were made by appellant and his counsel.

The entire proceeding was extremely informal and was marked by habitual interruptions, both in the case of questions and in the case of answers.

/s/ Claude L. Dawson

Subscribed and sworn before me this 21st day of March, 1956.

My Commission expires July 14, 1959.

(Notarial Seal)

/s/ Nada S. Howard
Notary Public, D. C.

502 [Filed April 20, 1956]

"Dawson Affidavit B"

Affidavit

Claude L. Dawson, being first duly sworn, on oath, deposes and says:

Affiant represented Oliver W. Toll (the plaintiff in the above-entitled case) in the latter's appeal to the Civil Service Commission from his separation from employment by the Federal Trade Commission in September and October, 1953.

Part of the evidence which Mr. Toll desired to present at the hearing to be held by the Civil Service Commission consisted of documents and information in the possession of certain persons in the Federal Trade Commission. In a hearing before the Civil Service Commission it is not possible by subpoena to obtain the attendance of witnesses or the production of documents. Accordingly I filed on behalf of Mr. Toll a Petition to Take Depositions under Rule 27(a) of the Federal Rules of Civil Procedure, Civil Action No. 289-54 in the United States District Court for the District of Columbia.

E. A. Dunton, an employee of the Civil Service Commission, was at that time in charge of the hearings to be held on reduction in force appeals to the Civil Service Commission. After said E. A. Dunton had been informed that the date set for the hearing of said District
503 Court case was March 1, 1954, said Dunton on February 19, 1954, set the hearing for said appeal to the Civil Service Commission for the same day, March 1, 1954. On affiant's objections, said Dunton with great reluctance on February 25, 1954, finally agreed to a postponement of only one day, namely to March 2, 1954.

The setting of the Civil Service Commission appeal immediately on the heels of the District Court case made it obviously impossible for Mr. Toll to present in the Civil Service Commission appeal any evidence which he might be able to obtain through the District Court proceeding.

Moreover, the nearly simultaneous setting of the District Court case and of the Civil Service Commission hearing handicapped the preparation of both matters, and it was obvious that it would do so.

I have handled many Civil Service Commission appeals in reduction in force cases. Such appeals are processed with great slowness by the Civil Service Commission. It is my experience that such appeals almost never clear the Civil Service Commission in less than six months, and it is not unusual for them to consume more than one year.

/s/ Claude L. Dawson

Subscribed and sworn before me this 21st day of March, 1956.
My Commission expires July 14, 1959.
[Notarial Seal]

/s/ Nada S. Howard
Notary Public, D. C.

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504 [Filed April 20, 1956]

Affidavit

James M. Mead, being first duly sworn, on oath deposes and says:

I served as a member of the Federal Trade Commission from November 16, 1949, until September 25, 1955. For about two years and ten months, from May 24, 1950, to March 31, 1953, I served as Chairman of the Commission. On April 1, 1953, Mr. Edward F. Howrey became a member of the Commission, and also on the same date succeeded me as Chairman. Mr. Howrey continued as Chairman until about September 11, 1955, when he resigned both as Chairman and as a member of the Commission. For nearly two and a half years, from April 1, 1953, until September 25, 1955, I served on the Commission during Mr. Howrey's Chairmanship. I was serving as a member of the Federal Trade Commission in September and October, 1953, when a reduction in force program for the staff of the Federal Trade Commission was instituted under the authorization of Chairman Howrey.

I am familiar with the conditions which existed at that time as to the work of the Federal Trade Commission, and the functions, operations

and work load of the various bureaus of the Commission, including the problems of performing the functions of the Commission within the limits of the appropriations made by Congress for its work.

Appropriations for the Federal Trade Commission for the prior fiscal year 1953 (including an allowance of $125,000 contained in the
505 Supplemental Appropriations Act, 1953) amounted to $4,178,800. The appropriation for the fiscal year 1954 was $4,053,800, which was thus $125,000 less than that for the preceding fiscal year 1953. It is apparent that the $125,000 decrease in the appropriation for the fiscal year 1954 amounted to less than 3 percent of the amount which had been available to the Commission during the prior fiscal year. The cut was less than that which had been made in fiscal year 1953 from the prior 1952 appropriation.

Prior to September, 1953, Chairman Howrey at several meetings of the Commission stated that extreme pressure was being exerted on him by the Republican National Committee to make positions in the Federal Trade Commission available for persons for whom the Committee was seeking jobs. The political pressure being exerted by the Republican National Committee to obtain patronage appointments was well known. The slogan "Jobs for Republicans" was repeatedly mentioned in the public press; and it was commonly understood that the Republican National Committee had established a "quota" of positions required for the different agencies, including the Federal Trade Commission. It was the understanding that David C. Murchison, the Assistant to Chairman Howrey, was the designated representative in the matter of patronage within the Federal Trade Commission.

Under Reorganization Plan No. 8 of March 13, 1950, the functions of the Commission with respect to revising budget estimates and with respect to determining the distribution of appropriated funds according to major programs and purposes have not been transferred to the Chairman, but have been reserved to the Commission as a whole. However, both in delaying any effective steps toward economizing until we were well into fiscal year 1954, and then in formulating and initiating the

reduction in force, Chairman Howrey acted independently. After the reduction in force had been begun, representations were made that the program was being apportioned so that each major bureau would receive the same dollar percentage of the cut with respect to the funds allotted to it for personal services. That undertaking was violated, and the personnel cut which was made seemed to fall with disproportionate force on the Commission's experienced employees. There were also instances of considerable hardship.

506 The cut made by the reduction in force was so deep that after four or five months it developed that there would be a prospect of a surplus for the fiscal year 1954 in the neighborhood of $200,000, unless expenditures for personnel were increased. Thereupon many promotions were made and there was considerable hiring of new employees.

I have always been in favor of the merit system in the Civil Service, and during my service in Congress was active in furthering it. A high standard of performance must be required of Government employees, and the necessary weeding out of persons who are incompetent or lazy must not be obstructed. But arbitrary power of discharge vested in the heads of agencies who are closely associated with political forces does not generally result in either the reward of merit or the elimination of incompetents, for the strong pressures of patronage are likely to overbear other considerations, and frequently even have a vicious tendency to strike down employees whose scruples make them troublesome to spoils system operations. Personnel changes motivated by patronage considerations are extremely damaging to employee morale and efficiency, and render the Civil Service less attractive to the type of employee whom it is important for the Government to attract and retain.

Necessary reductions in force are of course sometimes inevitable; but the recent employment of reduction in force procedures which in substance merely effect a substitution of personnel is contrary to the public interest and amounts to an evasion of the merit system. The administration of the Civil Service Commission reduction in force

regulations seems to lend itself to abuse. Apparently in the case of the Federal Trade Commission reduction in force in the fall of 1953 the normal application of the Civil Service laws in the selection of employees to be dismissed was altered by a proliferation of a very large number of artifical small theoretical segments of the attorney staff, whose functions were allegedly so different that personnel could not be interchanged between them without damage to the Commission's work. In view of the comparatively homogenous character of the legal work of the Commission and the frequency of transfers between different
507 positions such a procedure was obviously contrary to the facts.

/s/ James M. Mead

Subscribed and sworn to before me this 19th day of April, 1956.

/s/ Francis J. Broderick

Notary Public

My commission expires April 14, 1959.

[Notarial Seal]

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508 [Filed April 20, 1956]

Affidavit

Stephen J. Spingarn, being first duly sworn, on oath deposes and says:

I reside at 1900 Que Street, Northwest, Washington, D C. I served as one of the Commissioners of the Federal Trade Commission from October 25, 1950, to September 25, 1953.

I was one of the Commissioners on April 1, 1953, when Mr. Edward F. Howrey took office as a member of the Commission and its Chairman, and I was serving on the Commission at the time when the reduction in force proceedings in the Summer and Fall of 1953 were planned and commenced. The reduction in force followed a period in which there had been some dispute over the Chairman's appointments of new employees to highly paid positions. At the time, I wrote a memorandum for my own files on this matter because I though it was significant

and possibly indicative of things to come. At the hearing of July 20, 1955, of Subcommittee No. 1 on Regulatory Agencies of the Select Committee on Small Business of the House of Representatives which investigated some aspects of the Federal Trade Commission reduction in force that memorandum was cited to them, and appears in the transcript of the Committee's hearings. It is dated August 11, 1953. I gave it the title "First Commission Split on Appointments". It reads as follows:

509 "At Commission meeting today with only Commissioner Mason absent, Chairman Howrey asked for approval of his previous recommendations (sent to us by his note of August 6) of the appointment of Robert Parrish to be Executive Director and Alex Akerman, Jr., to be Secretary and Director of the Bureau of Administration. Mr. Howrey said that he had Mr. Mason's vote for these appointments and Mr. Carretta indicated his approval. However, Commissioner Mead indicated that he could not go along and expressed his concern about the trend that had begun in the Commission toward putting political appointees from the outside in key spots. Also, the business of layering present officials with new appointees or creating two jobs where only one grew before. In this connection Mead referred to Fitzhugh Green over Duncan Price, the two new appointees proposed in place of Scott Daniel, and the new Personnel Director being placed over McAdams. I supported Mead.

"The Chairman became quite angry. He said that he had been resisting enormous pressure from the Republican National Committee, that they had 8000 applicants over there for whom they were seeking jobs, that he had made very few appointments here at the Commission, and since he was Chairman he was entitled to the support of the Commission on such matters, and that if Mead and I were not going to support him on such matters he could play tough too and start making a lot of changes around here or words to that effect. The meeting broke up without a vote but of course, the Chairman has three votes on his proposal."

* * * * * *

Sometime in May, 1953, Congressional action on the bill which contained the Federal Trade Commission appropriations for the Fiscal Year 1954 (that is for the year beginning July 1, 1953, and ending June 30, 1954) made it obvious that some cut in the Federal Trade Commission appropriation for the Fiscal Year 1954 was impending.

I was concerned because the cut in appropriations would presumably necessitate a reduction in force. The reason for this concern was my belief that such a cut in personnel would be extremely damaging to the Commission's efficiency. It might involve the loss to the Commission of employees who had acquired years of experience in the Commission's work, and was likely to bring a very noticeable impairment
510 of staff morale. In reductions in force other factors than either years of service or excellence of work are also given major consideration in determining which employees should be selected for discharge. The anxiety which spreads through the organization when such a cut is in prospect reduces the quantity and quality of staff work. Those who remain lose in confidence and gain in cynicism.

* * * * * *

I believe that two points should be emphasized in connection with the 1953 reduction in force. First (as already stated), the failure to make the reduction promptly resulted in a larger reduction than would otherwise have been necessary. Second, the reduction was made without any allowance for the normal attrition that every agency experiences
511 as the result of deaths, retirements, resignations, and transfers of employees to other agencies. The 1953 reduction was computed as if there would be no decrease in staff by attrition during the fiscal year 1954. This second factor would seemingly make it inevitable that, following the reduction, the Commission would have to hire personnel to offset normal attrition. I understand that this has happened. I have also been informed that only one lawyer dismissed during the 1953 reduction has been rehired by the Commission, and that other lawyers

hired since then have been new personnel. In the light of the background of this matter, as stated above, it seems to me that an injustice has been done to persons such as Mr. Oliver Toll who were dismissed in the 1953 reduction and who, despite new hiring by the Commission, and their own desire to return to work there, have not been re-employed.

/s/ Stephen J. Spingarn

Subscribed and sworn to before me this 20th day of April, 1956.

/s/ Olive E. Fitzgerald
Notary Public, D. C.

My commission expires September 30, 1957.

(Notarial Seal)

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530 [On April 20, 1956, appellant filed an affidavit of Blanche M. Connors, R. 515-516, certifying to copies attached thereto of papers appearing in the Report of the Hearings held with regard to the Federal Trade Commission by Subcommittee No. 1 of the Small Business Committee of the House of Representatives. Exhibit (5) attached to said Connors affidavit was as follows:]

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D.C.

Filed: X. W:AP:em

August 28, 1953

Mr. David C. Murchison
Legal Advisor and Assistant
to the Chairman
Federal Trade Commission
Washington, D.C.

Dear Mr. Murchison:

In your letter of August 24, 1953, you asked for approval of your general plan of competitive levels to be used in the impending reduction in force at the Federal Trade Commission. Mr. Jack Delaney of your

office was kind enough to bring over the enclosed representative job descriptions to help us in our review of your request.

First, a few words about our responsibilities in administering the reduction in force regulations that are issued in accordance with Section 12 of the Veterans' Preference Act of 1944. We believe that we must do everything within our resources to help agencies to run fair and efficient reductions in force. We also have the responsibility of adjudicating employee appeals when it is alleged that an agency has not followed the reduction in force regulations. Excessive narrowness of competitive level is a common ground of employee appeal. The advance approval of specific competitive levels may put us in the position of being party to an action which we must later judge.

It can be argued that Federal agencies are often placed in that awkward position. We feel that in the case of competitive levels we cannot, without unjustifiable expense, gather enough information about specific jobs to feel confident in a prejudgment of possible appeals. That is why Section 20.4(b) of the Civil Service regulations reads as follows: "Within the competitive area the agency will determine competitive levels of positions to be affected by a reduction in force."

We cannot, therefore, give advance approval to the competitive levels which you outline in your letter.* * *

* * * * * *

Sincerely yours,
/s/ John W. Macy, Jr.
Executive Director

Enclosure 5369

[N.B.: Inserted in testimony of John A. Delaney, Director of Personnel, at p. 421 of the transcript of the hearing of July 21, 1955.]

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534 [Filed April 20, 1956]

County of Philadelphia:

State of Pennsylvania:

SS

Affidavit

Walter P. Buehler, of legal age, being first duly sworn, deposes and says:

On or about January 20, 1954, in the afternoon, I went with Oliver W. Toll to the office of John A. Delaney, Director of Personnel of the Federal Trade Commission, Constitution Avenue and Seventh Street, Northwest, Washington, D. C. * * *

* * * * * *

Mr. Toll stated to Mr. Delaney that Mr. Toll was requesting certain information relative to Toll's separation from employment.
535 Mr. Delaney said that Mr. Toll might see anything which Mr. Delaney considered pertinent to Mr. Toll's case. Delaney then checked his files to see what Toll's position had been, and said that Toll had been an excepted indefinite employee. He then stated that Toll could see the paper in the retention register with Toll's name on it, but could not see any other part of the retention register. Mr. Delaney said that Toll could see the job descriptions of the four men in Toll's "competitive level", that is, the job descriptions of Toll, Blalock, Sacra and Combs, but that since Toll had no reassignment rights Toll could not see any other job descriptions.

Mr. Toll then stated that his case involved questions as to what the correct extent of the "competitive level" in which Toll should have been placed really was, and as to whether positions were interchangeable, and thus he was interested in the facts as to what employees had been transferred from one position to another; therefore Toll wished to see the records as to such transfers. Mr. Delaney said that such information was not open to Mr. Toll.

Regarding the "competitive areas", I understood Mr. Delaney to say that everybody in Washington was in one "competitive area", including all the attorneys who worked in Washington. Regarding the "competitive levels" within that area, Mr. Delaney said that Mr. Toll could see only his own, since, according to Mr. Delaney, that was the only one pertinent to Toll's case.

* * * * * *

Mr. Delaney then stated that all of the reduction in force was
536 done on the basis of administrative judgment, which meant that they could wipe out any jobs which they wished and did not have to give reasons.

* * * * * *

As to Mr. Toll's questions with regard to the steps which were taken in determining which positions should be eliminated and which employees should be separated, and the basis on which such decisions were made, Mr. Delaney said that it was within the administrative prerogative to pick any position for elimination; and that as to "how, where, who and why", no information could be obtained.

Among the questions which Mr. Toll asked was whether he could see the records of recent transfers of attorneys from one position to another, and whether he could have access to information which would
537 show how many "competitive levels" had been set up on the retention register for attorney positions. Mr. Delaney answered both of those questions in the negative.

During the entire conversation Mr. Delaney did not suggest that he had ever shown Mr. Toll the retention register, or that Mr. Toll had ever seen it, or had ever stated that he did not wish to see it. The implications of the entire conversation were quite the contrary.

Further affiant sayeth not.

/s/ Walter P. Buehler

[Notarial acknowledgment]

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538 [Filed April 20, 1956]

Affidavit

CITY OF WASHINGTON, SS:

Oliver E. McAdams, of legal age, being first duly sworn, on oath deposes and says:

From March, 1949, to July, 1953, I served first as Assistant Director of Personnel and later as Director of Personnel of the Federal

Trade Commission. I was serving as Director of Personnel when Edward H. Howrey became Chairman of the Federal Trade Commission.

Shortly after Mr. Howrey's appointment as Chairman of the Commission, Mr. Howrey stated to me that he was under unbelievable pressure to find jobs for people, and inquired as to what positions might be made available. In that connection he inquired whether the position of Executive Director and Secretary of the Commission could be split into two positions. He stated that because of the pressure he was under he wanted to find positions to fill.

* * * * * *

539 About three o'clock one afternoon Mr. Murchison phoned me inquiring whether I would be in my office the following day. When I said that I would be, he replied that he was glad, because he wanted me to be there "to welcome the new Director of Personnel". On the following Monday Mr. John A. Delaney appeared, and took the oath of office but did not sign it. Mr. Delaney then suggested that I should take a grade 7 or grade 9 job temporarily, but I declined to do so.* * *

Mr. Delaney directed me to work with him in setting up competitive areas and competitive levels for a reduction in force, which he said Mr. David C. Murchison, who had been brought to the Commission staff as Mr. Howrey's legal advisor and assistant , had directed should be carried out. In connection with that work, I explained to Mr. Delaney that the actual legal techniques of the work in the different bureaus and divisions were very similar, the principal difference being the law or section of law which the different units were responsible for handling;

540 that Federal Trade Commission attorneys had always been appointed from a single employment register; that attorneys had frequently been reassigned from one division to another and from one bureau to another without any period for orientation or training in the new work; and that it would be evident by the examination of the files of many of the attorneys that for years many attorneys had been frequently reassigned between various units. However, Mr. Delaney wished to get a highly

subdivided classification of competitive levels. Such a classification in its nature would result in placing a very few attorneys in each competitive level. Under the arrangement which Mr. Delaney wished, if it were desired to reach an individual in a reduction in force only a few others, or perhaps no others, would need to be sacrificed in order to reach him.

The reduction in force in the Federal Trade Commission in 1953 was begun with a list of names of people to be reached. Prior to the establishment of the competitive areas and competitive levels to be used in setting up the reduction in force I was handed a list by Mr. Delaney with this statement: "Here is Mr. Babcock's list." Mr. Delaney stated to me at that time that the people named on it were to be reached, if possible, by reduction in force. The list was less than a page long, but it contained a dozen or more names * * *

In my opinion, the procedure followed in the Federal Trade Commission reduction in force in September and October, 1953, in its severe narrowing of competitive areas and competitive levels exceeded authority for reduction in force delegated to individual agencies by the Civil Service Commission, and therefore could not be legally adopted without prior Civil Service approval. At Mr. Delaney's request I took to the Civil Service Commission a letter requesting prior approval by the Civil Service Commission of certain proposed competitive areas. At the Civil Service Commission I talked to Mr. E. A. Dunton, who was
541 in charge of certain reduction in force matters. After discussion of the situation, Mr. Dunton remarked that he felt that in submitting the request we had "thrown him a low curved ball."

Shortly after Mr. Delaney had taken over my office I was called to Mr. Murchison's office, and was asked about a dozen times whether I intended to appeal to the Civil Service Commission as to having been superseded as Director of Personnel. I repeatedly replied that I had been told that I was to have a position of the same grade and salary as that which I had been occupying. Mr. Earl W. Kintner, the General

Counsel, who was present, said that that was the Chairman's intention, and that he would take Mr. Howrey sorely to task if Mr. Howrey did not live up to his agreement. Mr. Murchison also inquired whether I intended to go to the newspapers with the matter, and said that the Chairman would be very much embarrased to have the matter get into the newspapers.

Sometime later I was directed to reprocess papers appointing Mr. Delaney to the position of Director of Personnel. I then learned for the first time that during the time when Mr. Delaney had taken over my office and assumed complete control of the functions of the Office of Personnel in the Federal Trade Commission, Mr. Delaney had not actually been employed by the Federal Trade Commission, but had been on reimbursement detail from RFC, and I had been in the position of the head of the Personnel Office.

After Mr. Howrey took over control of the Federal Trade Commission, under his direction or that of his immediate subordinates who had been brought in to the staff of the Federal Trade Commission by Mr. Howrey, there was an increase in the number of higher positions in the Federal Trade Commission, which included the following: The position of Executive Director and Secretary, at grade 15, was split into Executive Director, at grade 15 (filled by a new man, Robert M. Parrish), and Secretary, at grade 14. Since Alex Akerman, Jr. (a new man) did not have civil service status he could not be appointed directly to the position of Secretary. Accordingly, he was appointed as an attorney, and detailed to the position of Secretary. In the
542 Division of Personnel the position of Director of Personnel was upgraded from a GS-13 to a GS-14 for a new man, Mr. Delaney. In the division of Import Trade the top position of grade 13 was split into two positions, and a new man, Bernard B. Smyth, was put in one of them. In the Division of Information a grade 12 position was cancelled, and a new grade 14 position was created for a new man, Fitzhugh Green. David C. Murchison, a new man, was appointed to an existing

position of Legal Adviser to the Chairman, at grade 14. That position was then upgraded to a grade 15. Mr. Murchison also sought to have the position of Chief Hearing Examiner upgraded from grade 14 to grade 15.

* * * * * *

/s/ Oliver E. McAdams

Subscribed and sworn to before me this 16th day of March, 1956.
My commission expires March 14, 1960.
(Notarial seal)

Anne W. Toliver
Notary Public

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543 [Filed April 20, 1956]

CITY OF WASHINGTON: SS:

"Toll Affidavit A"

Affidavit

Oliver W. Toll, being duly sworn on oath deposes and says:

On September 16, 1953, I filed with the United States Civil Service Commission an appeal from my discharge from employment by the Federal Trade Commission. A copy of said appeal is hereto attached marked "Exhibit 1." The statement of the grounds of said appeal were supplemented by my letter to the Civil Service Commission dated October 8, 1953, a copy of which is hereto attached marked "Exhibit 1(a)." Thereafter, I received from said Civil Service Commission a letter dated September 21, 1953, signed by E. A. Dunton, Head, Reduction in Force Group, a copy of which is hereto attached marked "Exhibit 2." Said letter from the Civil Service Commission enclosed a form entitled "Reduction-in-Force Appeal -- Request for Additional Information." Photostatic copies of the face and reverse of said form are hereto attached marked "Exhibit 3" and "Exhibit 3(a)." By letter dated September 25, 1953, to the Civil Service Commission, I supplied

said Commission with all the material and information requested on said form.

On September 22, 1953, I wrote to Mr. James A. Horton,
544 Director of the Bureau of Industry Corporation in which I was employed, requesting to be allowed to take a reduction to Grade GS-9 in order that I might render it indisputable that I was in the same "competitive level" with certain other attorneys (Kenneth L. Sloan and Lynn M. Hubler) who had that grade in the same bureau and division in which I was employed and over whom I had admittedly superior retention rights under the reduction in force regulations of the Civil Service Commission. A copy of that letter is hereto attached marked "Exhibit 4."

On September 29, 1953, I wrote the Federal Trade Commission, attention: Personnel Director, requesting that my name be placed on any and all reemployment lists maintained for any attorney positions with the Federal Trade Commission for any and all grades of GS-13 or lower. A copy of said letter is hereto attached marked "Exhibit 5." Thereafter, I received a letter from Mr. John A. Delaney, Personnel Director of the Federal Trade Commission, with respect to that request. Mr. Delaney's letter was dated September 30, 1953. A copy thereof is hereto attached marked "Exhibit 6."

* * * * * * *

In response to my letter to Mr. Horton (Exhibit 4 above), I received a memorandum from Mr. Robert M. Parrish, Executive Director of the Federal Trade Commission, dated October 7, 1953, a copy of which is hereto attached marked "Exhibit 8."

On or before November 18, 1953, I inquired at the Civil Service Commission as to what steps I could take to obtain reemployment by the Government in accordance with my rights under Section 15 of the

Veterans' Preference Act. In compliance with the directions given me with regard thereto I filed with the Civil Service Commission an application for such reemployment and also a copy of the separation notice
545 which I had received. In response to that application, I received a letter dated December 9, 1953, from William C. Hull, Executive Assistant, Civil Service Commission, a copy of which is hereto attached marked "Exhibit 9." With said letter (Exhibit 9) there was returned to me the copy of my separation notice which I had left with the Civil Service Commission pursuant to my attempt to obtain reemployment, signifying, I believe, that my consideration in connection with reemployment was closed.

A hearing on my appeal to the Civil Service Commission from my discharge was held on March 2 and 3, 1954. On or about April 13, 1954, I received a letter from the Civil Service Commission signed by E. A. Dunton, Chief, Appeals Examining Office, dated April 9, 1954, ruling adversely on my appeal. On April 16, 1954, I filed an appeal therefrom, a copy of which is hereto attached marked "Exhibit 10."

About five and a half months later I received a letter from the Civil Service Commission dated September 30, 1954, signed by John E. Blann, Chairman, Board of Appeals and Review, by which the initial decision of the Appeals Examining Office dated April 13, 1954, was affirmed. A copy of said letter of September 30, 1954, is hereto attached marked "Exhibit 11."

It has been and was then the practice of the Board of Commissioners of the Civil Service Commission -- the Commissioners themselves, as distinguished from the Board of Appeals and Review -- to consider many further appeals on veterans' cases after the initial decision by the Appeals Examining Office had been affirmed by the Board of Appeals and Review. Knowing that such appeals to the Commissioners themselves (as distinguished from the Board of Appeals and Review) were often taken and allowed, I believed that such an appeal was proper and was necessary in my case in order that I should have

exhausted my administrative remedies as a condition to Court review. Accordingly, on October 5, 1954, I filed such an appeal, stating:

546 "It is intended hereby to make and prosecute so far as possible any and all administrative appeal or appeals available to me * * *, including an appeal to the Commissioners themselves of the Civil Service Commission; and appellant asks that this document shall be construed as constituting such appeal * * *" (italics supplied)

A copy of said appeal is hereto attached marked "Exhibit 12." Said appeal was taken in the honest belief that it was necessary in order for me to exhaust my administrative remedies, and the appeal showed on its face that my intention was to appeal to the Commissioners themselves and to exhaust my administrative remedies.

Nearly one month later, in response to that appeal (Exhibit 12), I received a letter from the Civil Service Commission dated November 2, 1954, signed by John E. Blann, Chairman, Board of Appeals and Review. His letter made no references to my attempt to appeal to the Commissioners themselves, but discussed points which he had failed to discuss in his previous opinion. It purported to be a reconsideration of the case by the Board of Appeals and Review, and concluded, exactly as the former opinion of September 30, 1954, (Exhibit 11) had done, in the form used for opinions by the Board of Appeals and Review, namely, "For the Commissioners:***Board of Appeals and Review." It stated: "the previous decision is therefore affirmed." A copy of said letter of November 2, 1954, is hereto attached marked "Exhibit 13."

I honestly and reasonably understood that said letter of November 2, 1954, (Exhibit 13) amounted simply to a reconsideration of the Board's former affirmance, and that it was not responsive to my attempt to appeal to the Commissioners themselves. Believing, as before, that a ruling upon an attempt to appeal to the Commissioners themselves was necessary in

order to exhaust my administrative remedies, I addressed an appeal, filed November 8, 1954, to "The Commissioners, United States Civil Service Commission". In that appeal I stated:

> "It is also intended by this appeal to exhaust completely all administrative appeals open to this appellant * * *, so that appellant will not continue to be further debarred from obtaining redress therefrom in the Courts; and appellant asks that
547 whatever answer is made to this appeal * * * shall include a certification that appellant has exhausted all administrative remedies and appeals open to him * * *" (italics supplied).

A copy of said appeal of November 8, 1954, is attached to this affidavit marked "Exhibit 14."

Some ten days later a response to that appeal was made by John E. Blann, Chairman, Board of Appeals and Review, dated November 17, 1954, mailed November 18, 1954, and received by me November 19, 1954. A copy of said response is attached to this affidavit marked "Exhibit 15." In said response said John E. Blann claimed that his letter of November 2, 1954, (Exhibit 13) was merely "in reply to specific questions you raised regarding the decision of September 30, 1954", and claimed that his letter of September 30, 1954, (Exhibit 11) "represents a final decision within the Commission". Said letter dated November 17, 1954, (Exhibit 15) was the first intimation which I received that I had been denied an appeal to the Commissioners themselves or had received a final decision from the Civil Service Commission. Until its receipt I honestly believed that I had not received a final decision from the Commission and had not exhausted my administrative remedies, and could not apply for Court relief.

In other cases the Civil Service Commission has asserted that the decision of the Board of Appeals and Review is not a final decision. Also inconsistent with the claim of finality for the decision of September

30, 1953, (Exhibit 11) is a Civil Service Commission Transmittal Sheet 502 ("TS 502"), of April 28, 1955, a copy of which, with its accompanying pages Z1-301 to Z1-306.01 inclusive is hereto attached marked "Exhibit 16". Said TS 502 transmitted changes in Part 22 of the Civil Service Commission regulations involving appeals under Section 14 of the Veterans Preference Act (as distinguished from Part 20 of the regulations under Section 12 of the Veterans Preference Act, which is involved in the instant case). Section 22.503, found on page Z1-305 of
548 Exhibit 16, was a new provision (as appears from the table on Z1-306.01 of Exhibit 16), which provided that

> "The decision on an appeal to the Board [of Appeals and Review] shall be final. There is no further right to appeal. * * * "

There was no such provision in the regulations under Part 20 at the time of plaintiff's appeal (or now). Commenting on the effect made by the insertion of Section 22.503, Transmittal Sheet 502 (cover page of Exhibit 16) describes it as a "substantive change", a "change in substance". No such change has ever been made in the regulations under Part 20, involved in the instant case: hence, in appeals in reduction in force cases the decision of the Board of Appeals and Review has never been made final.

After the final determination of the Civil Service Commission, I consulted various attorneys as to bringing my suit in the District Court. However, the case was one which would require a great deal of time, and it became apparent that reasonable legal fees for an attorney's services to represent me in it were beyond what I could afford. I therefore attempted to prepare the case myself. In this I met many difficulties: (1) While I have had many years of law work, my practice in courts (except for work in the Tax Court and in courts abroad) had been prior to the adoption of the Federal Rules, and I was confronted with principles and procedures with which I was unfamiliar; (2) Some background study of

the legal principles involved in appeals from administrative decisions appeared to me to be important, and the subject is not free from difficulties; (3) The regulations of the Civil Service Commission which were involved are complicated, confused, and cryptic; (4) The regulations involve not only material published in the Federal Register but also much material which is not published anywhere except in the Federal Personnel Manual; some of that material had been declared "obsolete", and it
549 was difficult to locate it and obtain copies of it; (5) The concepts and terminologies involved in the Civil Service Commission regulations-- for example, the distinction between the so-called "competitive service" and the so-called "excepted service"-- are based on an historical development in which concepts and terminologies have repeatedly changed and reversed themselves, and are now artificial, abstruse and inconsistent, and as to their basic principles incomprehensible, beyond any other legal subject which I have ever encountered; (6) No current text giving adequate assistance in this field can be found, and no administrative decisions establishing precedents are available to the public; (7) I had no office in which I could work, but my work had to be done in public law libraries and in my home, where facilities were not well adapted for speedy efficient work; (8) I had at the time a part-time outside employment, which I attempted to continue, * * * which somewhat limited available time. Working most week-ends and many evenings, I prepared and filed my suit in the District Court within 68 days from the date when I received a final decision from the Civil Service Commission.

Defendants have not changed their course of conduct induced by any misunderstanding. Pursuant to their usual deliberate policy in employee cases, they have consistently sought delays. Delays in the Civil Service Commission proceedings in this case which could in no way be attributable to me exceeded six months. Since this case

has been pending in the District Court defendants' wholly unexcused defaults have obstructed progress in the case for periods aggregating approximately nine months, notwithstanding my request for greater promptness. A copy of my letter to Mr. Joseph M. F. Ryan, Jr., dated October 25, 1955, is hereto attached marked "Exhibit 17". I have been ready, willing and able at all times to resume my employment, and defendants have been so informed. Meanwhile they have
550 employed other attorneys, in violation, as I believe, of my rights of reemployment, for positions for which I was qualified.

/s/ Oliver W. Toll

Subscribed and sworn to before me this 20th day of April, 1956.

(Notarial seal)

/s/ John H. Hein
Notary Public

My Commission expires February 14, 1959.

[The following exhibits were attached to Toll Affidavit A]

EXHIBIT 1

551 To The Civil Service Commission:

I. The undersigned, Oliver W. Toll, hereinafter called the appellant, hereby appeals from the selection, determination or order directing his separation and elimination as an employee of the Federal Trade Commission, notice whereof was contained in a letter to him dated September 8, 1953.

II. For grounds of his appeal appellant states:

* * * * * * *

2. Said separation order was based upon, and approximately resulted from, errors in the determination of the so-called "competitive level" from which the elimination of employees was made, and would not have been made had proper "competitive levels" been established. The errors in the determination of said "competitive levels" included the following:

(a) The "competitive level" in which appellant was placed was excessively narrow and failed to include all of the divisions or sections in the Federal Trade Commission between which employees could be transferred without unreasonable inconvenience.

(b) The "competitive level" in which appellant was placed was excessively narrow in that it failed to contain all the individuals of various grades who were in fact interchangeably available for the same type of work.

(c) The "competitive level" in which appellant was placed failed to correspond with the actual facts of the agency's operation.

* * * * * * *

552 4. Said separation order was made in violation of appellant's veteran's preference rights under the available statutes and regulations.

5. Said separation order was made in violation of appellant's rights of permanent civil service status under the applicable statutes and regulations.

6. Said separation order was made in violation of appellant's rights by virtue of his tenure and government service and was in violation of the applicable statutes and regulations.

* * * * * * *

Respectfully submitted,

/s/ Oliver W. Toll

September 16, 1953.

EXHIBIT 1 (a)

553

Washington D. C.
October 8, 1953

United States Civil Service Commission
Washington, D.C.

Gentlemen:

As is hereafter indicated I hereby supplement and make more specific the appeal which I have heretofore filed with you from the action of the Federal Trade Commission directing my separation from employment with that agency by adding to my said appeal the following paragraphs, to-wit:

* * * * * * *

10. On or about November 19, 1942, appellant acquired a competitive civil service status under the laws of the United States, to-wit, under the Ramspeck Act and under Executive Order 8743, as a Principal Attorney with the grade of P-6, which is equivalent to the present grade of GS-13, and appellant is still possessed of said civil service status. By virtue of said status appellant is vested with the rights of a career employee * * *.

* * * * * * *

12. From the standpoint of the law and regulations with respect to the carrying out of a reduction in force applicant has so-called retention rights which are superior to those of various other attorneys employed in the Trade Practice Conference Division in the Federal Trade

Commission and whose names appeared in the same so-called retention register, including the following attorneys who received the classifications hereinafter shown respectively, to-wit: Kenneth L. Sloan, III-A, 14 points, and Lynn M. Hubler, III-A, 7 points. Said attorneys Sloan and Hubler hold positions in Grade GS-9 and appellant holds a position in grade GS-11. On the pretext that appellant holds a position with a different grade from the grade of said other attorneys the Federal Trade Commission has asserted that appellant and said other attorneys are not in the same so-called "competitive level", and on that ground has denied appellant his rights under the statutes and regulations, and particularly under the Veterans' Preference Act of 1944 to be retained in employment
554 in preference to said attorneys Sloan and Hubler, who have been retained in their employment. In truth and in fact appellant's services and the work which appellant has been performing and is or may be called upon to perform are interchangeable with the services and with such work of numerous other attorneys employed in Trade Practice Conferences Division, including in particular the said attorneys Sloan and Hubler. * * * Thus cases have been transferred frequently indiscriminately between attorneys in the various grades GS-12, GS-11 and GS-9, including transfers of cases between appellant and attorneys in grades GS-12 and GS-9.

* * * * * * *

Respectfully submitted,

Oliver W. Toll, Appellant

EXHIBIT 2

September 21, 1953

555 Mr. Oliver W. Toll
Federal Trade Commission
Washington, D.C. Re: Your letter of

Dear Mr. Toll:

In your letter referred to above, you indicate that you desire to

appeal from the notice of reduction in force which your agency has recently given you.

* * * * * * *

Federal employees have the right to appeal reduction in force actions adversely affecting them to the Civil Service Commission whenever they believe their agencies have not properly applied the Retention Preference Regulations. It is, of course, the responsibility of each agency, not the Civil Service Commission, to decide whether to carry out a reduction in force and what positions to abolish. If the agency has properly applied the Retention Preference Regulations, the Civil Service Commission cannot make a decision in favor of the employee who has appealed. * * *

Your letter does not give us all the information we need. Please answer the questions in the sections we have checked on the enclosed form.

If we do not receive this information from you within 15 days from the date of this letter, we will assume that you are no longer interested in continuing your appeal and your case will be considered closed. * * *

Very truly yours,

/s/ E.A. Dunton, Head
Reduction in Force Group

Enclosure

EXHIBIT 3

556 **UNITED STATES CIVIL SERVICE COMMISSION**

EXAMINING AND PLACEMENT DIVISION

REDUCTION IN FORCE GROUP

Reduction-In-Force Appeal -- Request for Additional Information

Sep. 21, 1953

Section I. General. * * *

Section II. Basis for Appeal. Please check the box or boxes below which indicate the basis for your appeal. For those boxes checked, please give us as much information as possible to substantiate your claim.

* * * * * * *

My competitive area is too narrow. Explain:

My competitive level is too narrow. Explain:

* * * * * * *

I believe that I am qualified to "bump" a person or persons in lower retention sub-groups. (For each such person, give name, title of position, and grade.) Explain:

* * * * * * *

USCSC -- Washington D. C.

EXHIBIT 4

558 September 22, 1953

Mr. James A. Horton
Director
Bureau of Industry Cooperation

Dear Mr. Horton:

In regard to the current reduction in force, it is my understanding that I have higher retention rights than certain GS-9 attorneys in the same register in which my name appears, who are in fact doing substantially the same work as I. It is my belief that under the statutes and regulations I should have been placed in the same so-called "competitive level" with them, which would have rendered my elimination, they remaining, impossible. Moreover, of course I should prefer to take a reduction to a GS-9 rather than being dismissed. It seems hard that, under the circumstances, my higher rank should be used as facilitating my dismissal. Assuming that the procedure used purports to accord with Civil Service rules, obviously it is in violation of the spirit of the statute.

I have retained my rights by an appeal. While I believe that the

action in my case is reversible error, of course I should like to avoid the necessity of contest.

As a possible solution, I suggest that either I be allowed to take a reduction to a GS-9 (in the current reduction-in-force proceedings other attorneys have been allowed to take reductions) or that I be placed on leave without pay. I feel confident that it will not be long before new attorneys will be employed, and it seems to me only fair that at that time I should be placed again on active status. As I understand the rather peculiar interpretation which is being given to the statutes, if I am removed from the roles I will have no assurance of such reemployment. I believe that it would be for the interest of this Division that I be kept eligible for such further work.

Very respectfully,

Oliver W. Toll

EXHIBIT 5

559

Washington, D.C.
September 29, 1953

Federal Trade Commission
Washington, D.C.

Attention: Personnel Director

Gentlemen:

I request that my name be placed on any and all reemployment lists maintained for any attorney positions with the Federal Trade Commission, and that I be reemployed in any such position for Grade 13, or for Grade 12 or for Grade 11, or for any lower grade, or for Grade GS-5, or above, in which at any time hereafter persons may be employed.

Kindly inform me in writing what action is being taken pursuant to this request.

Yours very truly,

Oliver W. Toll

The above request is without prejudice to my current request not to be removed from the employment rolls and may be regarded as contingent upon said current request being denied.

OWT

EXHIBIT 6

560 FEDERAL TRADE COMMISSION

Washington 25, D.C.

September 30, 1953.

Mr. Oliver W. Toll
Federal Trade Commission
Washington, D.C.

Dear Mr. Toll:

Reference is made to your letter of September 29, 1953, concerning your request that your name be placed on reemployment lists for attorney positions with the Federal Trade Commission. I wish to assure you that your name will be placed on such reemployment lists and that you will be given consideration for reemployment whenever the financial situation of the Federal Trade Commission permits.

Sincerely yours,

/s/ John A. Delaney
Director, Office of Personnel

EXHIBIT 8

562 Office Memorandum

UNITED STATES GOVERNMENT

FEDERAL TRADE COMMISSION

Date: October 7, 1953

TO: Mr. Oliver W. Toll
Attorney-Adviser
Division of Trade Practice Conferences

FROM: Robert M. Parrish [Signed] Robert M. Parrish

SUBJECT: Reduction-in-force Notice.

This is in reference to your letter of September 22, 1953 to Mr. Horton, which was referred to me under date of October 6, relating to your reduction-in-force notice.

Our personnel files indicate that you have an appointment as a GS-11 excepted attorney, and that you are unfortunately an indefinite employee as well. Under my understanding of applicable Civil Service rules and regulations, excepted attorneys have reassignment rights only upon the same retention register and only within the same grade level. Inasmuch as you have an indefinite appointment, and the other three attorneys in Grade GS-11 on your register do not, you accordingly had the lowest retention rights of the four employees involved.

In connection with the current reduction-in-force, personnel affected have been permitted to displace persons of lower retention status to the extent provided by Civil Service rules and regulations. Inasmuch as the rules and regulations in question make no provision for such displacement with regard to excepted attorneys in connection with positions of a lower grade level, a lower level position has not been tendered to you.

You have also inquired about the possibility of being placed on a leave without pay status. We have followed the uniform policy, consistent with prevailing practice among government agencies, of refusing to place employees subject to a reduction-in-force in a leave without pay status. This has been true not only in the case of attorneys in your category but in the case of classified attorneys having permanent appointments as well. An exception to this policy has been made in one type of case. You have advised me that your case does not come within this category.

Consequently, I very much regret the necessity of advising you that I am not in a position to comply with either of your suggestions.

EXHIBIT 9

563 UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D.C.

December 9, 1953

Mr. Oliver W. Toll
2 Newlands Street
Chevy Chase 15, Maryland

Dear Mr. Toll:

Reference is made to the enclosed copy of your reduction in force notice which you submitted to this office with an application form 57. This form has been combined with your original application already rated eligible for Administrative Officer GS 13 positions.

Under the Commission's program of assistance to separated career employees assistance is given only to career (Group I) and career-conditional (Group II) employees with competitive status who are separated or furloughed from their agencies through reduction in force. Your reduction in force notice shows that you were separated from an excepted position in Group IIIA. Persons occupying "excepted" positions do not compete with persons holding positions in the competitive service. An employee in an excepted position reached for layoff and separated, has no job re-assignment rights. Accordingly, you are not eligible for placement consideration as a separated career employee and your application for Administrative Officer can be given consideration only under regular certification procedures.

* * * * * * *

The records show that you acquired a competitive civil service status under the provisions of the Ramspeck Act and Executive Order 8743, effective November 19, 1942 as an Attorney with the Treasury Department, Bureau of Internal Revenue, New York, New York, before attorney positions were removed from the classified service. You resigned this position on February 24, 1944 and resumed Federal employment in an excepted position on April 19, 1946.

As you have a competitive civil service status, upon meeting the requirements, you may be considered for an indefinite appointment to

any position in the Federal service. Application should be made direct to the appointing official of any agency in which you desire to obtain employment. Your prospects for securing employment on the basis of your status depend largely upon your own efforts to interest an appointing official in taking the necessary action to employ you.

Sincerely yours,

/s/ Wm. C. Hull
Executive Assistant

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584 [Filed April 20, 1956]

"TOLL AFFIDAVIT C"

AFFIDAVIT

Oliver W. Toll, being duly sworn on oath deposes and says:

I certify that the attached "Howrey Exhibit B" is a true and correct copy of the material supplied to me, at the office of Subcommittee No. 1 on Regulatory Agencies of the Select Committee, of the House of Representatives, to Conduct a Study of the Investigation of the Problems of Small Business, as a copy of an exhibit supplied to said Subcommittee by Edward F. Howrey or by the Federal Trade Commission as a part of the response made to the inquiry ("Question 25") of said Subcommittee as to appointments to the staff of the Federal Trade Commission (and also as to certain promotions) made subsequent to the incumbency of said Edward F. Howrey as Chairman of said Federal Trade Commission. The record shows that Howrey Exhibit B is a list of the new appointments. (See page 21 of the official transcript of the hearing of said Subcommittee held on July 18, 1955).

It has not been possible for me to fix the dates on which the various appointments listed in said "Howrey Exhibit B" were made, although obviously they were all made after April 1, 1953, when Mr. Howrey's incumbency began, and it is my understanding and belief that most (although probably not all) of them were made prior to the termination of

the fiscal year 1954, viz., June 30, 1954. (In that connection see page
585 42 of the deposition of John A. Delaney, given before D. F. King, Notary Public, on the afternoon of December 22, 1955, filed in this action.)

It is my understanding and belief that during the fiscal year 1954 and after the reduction in force of September and October, 1953, many promotions were made of attorneys on the staff of the Federal Trade Commission, including the promotion in February or March, 1954, of a large number of attorneys of grade GS-9 to grade GS-11. It has not been possible to allege such facts with greater specificity because of the fact that such information is within the exclusive possession of the defendants in this action, who refuse to divulge it.

/s/ Oliver W. Toll

Subscribed and sworn to before me this 18th day of April, 1956.

(Notarial seal)

Nina L. Britton, Notary Public

My commission expires September 30, 1957.

[Attached to "Toll Affidavit C"]

HOWREY EXHIBIT B

Name	Present Title	Grade	Salary
Shumate, Clare	Executive Secretary to Chairman	GS-9	$ 5,185
Murchison, David C.	Legal Adviser and Assistant to Chairman	GS-16 GS-14	12,000 10,600
Wald, Robert L.	Attorney-Adviser	GS-11	5,940
Kearney, William R.	Trial Attorney (Attorney-Adviser)	GS-9	5,060
Somers, William R.	Trial Attorney	GS-11	5,940
Kratz, Kent P.	Attorney-Adviser	GS-11	5,940
Heim, John R.	Assistant to Executive Director (Attorney-Adviser)	GS-14	9,600

Name	Present Title	Grade	Salary
Melangton, Philip R.	Trial Attorney (Attorney-Adviser)	GS-9	$ 5,060
Smith, Adeline G.	Business Economist	GS-7	4,955
Williamson, B.M.	Attorney-Adviser	GS-13	8,360
Horan, Harold L.	Attorney-Adviser	GS-9	5,060
Cook, William H.	Attorney-Adviser	GS-9	5,060
Riggleman, John R.	Business Economist	GS-14	10,200
Corkey, James E.	Trial Attorney	GS-13	8,760
Smeraldi, Joseph G.	Attorney-Adviser	GS-9	5,060
Norvell, Ray C.	Attorney-Adviser	GS-9	5,060
Skeirik, Kaleel C.	Business Economist	GS-11 (GS-9)	5,940 (5,685)
Whiting, Frank M.	Attorney-Adviser	GS-9	5,435
House, Simeon F.	Attorney-Adviser	GS-12	7,640
Egre, Julian S.	Attorney-Adviser	GS-12	7,240
Tincher, William R.	Trial Attorney	GS-11	5,940
Carhart, Dwight L.	Attorney-Adviser	GS-12	7,040
Rolander, Robert D.	Attorney-Adviser	GS-9	5,060
Pons, Henry G.	Attorney-Adviser	GS-11	6,340
Laughlin, Loren H.	Hearing Examiner	GS-15	10,800
Lindsey, Florence	Statistician	GS-9	5,560
Markham, Jesse W.	Director, Bureau of Economics	GS-16	12,000
Trueblood, Paul H.	Asst. Secretary Legal and Public Records	GS-12 (GS-9)	8,040 (5,810)
Knopp, Edna	Business Economist	GS-9	5,810
Smyth, Bernard B.	Chief, Division of Export Trade	GS-14	9,600
Faulkner, Marion W.	Secretary	GS-8 (GS-7)	5,120 (4,955)
Delaney, John A.	Director of Personnel	GS-14	9,800
Parrish, Robert M.	Secretary of Commission	GS-15	11,300
Akerman, Alex. Jr.	Executive Director	GS-17	13,000
Sherwood, Robert B.	Assistant Director of Personnel	GS-13	8,360

Name	Present Title	Grade	Salary
Skonberg, Carl M.	Business Economist	GS-13	$ 9,360
Stowe, Seymour F.	Chief, Division of Public Information	GS-14	9,600
King, Donald K.	Trial Attorney (Attorney-Adviser)	GS-13	9,360
Thronton, Barbara M.	Secretary to Commissioner Secrest	GS-8	4,620
Walker, John T.	Trial Attorney (Attorney-Adviser)	GS-13	8,360
Snavely, Charles T.	Attorney-Adviser	GS-12	8,040
Young, Roslyn D.	Trial Attorney (Attorney-Adviser)	GS-11	5,940
Saxon, Janet D.	Attorney-Adviser	GS-9	5,060
MaHanna, William R.	Attorney-Adviser	GS-11	5,940
Haley, William H.	Legal Assistant (Temporary)	GS-11	5,940
Green, Fitzhugh	Executive Assistant for Public Affairs to handle public relations		

(Position to which originally appointed in parenthesis)

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741 [Filed April 23, 1956]

MEMORANDUM OF MATTERS RELIED UPON BY PLAINTIFF IN SUPPORT OF HIS OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff relies on the following material of record heretofore filed in this action in support of his opposition to defendants' Motion for Summary Judgment:

1. Plaintiff's Opposition to Defendants' Motion for Summary Judgment and plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment;

2. The pleadings and other proceedings heretofore filed or had in this action;

3. The following depositions heretofore filed in this action:

a. Deposition of John A. Delaney taken on the morning of December 22, 1955, before Elizabeth Guhring, Notary Public;

b. Deposition of John A. Delaney taken on the afternoon of December 22, 1955, before D. F. King, Notary Public, with exhibits;

c. Deposition of James A. Horton taken February 24, 1956, before Alfred F. Goldstein, Notary Public;

d. Deposition of Austin H. Forkner taken March 26, 1956, before Henry M. Kuzniar, Notary Public, with exhibit;

4. The following affidavits heretofore filed in this action:

a. Affidavit of Hon. James M. Mead;

b. Affidavit of Hon. Stephen J. Spingarn, with the attachment thereto;

742 c. Affidavit of Oliver E. McAdams;

d. Affidavit of Claude L. Dawson, marked "Dawson Affidavit A";

e. Affidavit of Claude L. Dawson, marked "Dawson Affidavit B";

f. Affidavit of Walter P. Buehler;

g. Affidavit of Blanche M. Connors, with six exhibits attached thereto marked respectively "Exhibit (1)" to "Exhibit (6)", inclusive;

h. Affidavit of Oliver W. Toll, marked "Toll Affidavit A", with 19 exhibits attached thereto marked, respectively: "Exhibit 1, Exhibit 1(a), Exhibit 2, Exhibit 3, Exhibit 3 (a), and Exhibits 4 to 17, inclusive;

i. Affidavit of Oliver W. Toll, marked "Toll Affidavit B", with exhibits A, B and C attached thereto;

j. Affidavit of Oliver W. Toll, marked "Toll Affidavit C", with exhibit marked "Howrey Exhibit B" attached thereto.

/s/ Clayton L. Burwell
Attorney for Plaintiff

[Filed July 20, 1956]

2 Monday, April 23, 1956.

Before Judge F. Dickinson Letts at 10 a.m. today, on motion of defendants for summary judgment, and on motion to amend complaint.

Appearances: For plaintiff, Mr. Clayton L. Burwell; For defendants, Mr. Joseph M. F. Ryan, Jr.

PROCEEDINGS

* * * * * * *

3 The Court. Let me ask, Mr. Burwell, is it agreed that the record of the Federal Trade Commission, which is found in the file, is a part of the record of the case and should be considered by the Court incident to this motion for summary judgment?

Mr. Burwell. Your Honor, it is not so agreed, and I could state in a second my objection to it.

Mr. Ryan. Your Honor, may I interrupt for just a minute? I did include it in my motion for summary judgment, Your Honor. It says * * * [reads entire Motion for Summary Judgment] * * * So I

4 incorporated them right in my motion.

The Court. What can be your objection?

Mr. Burwell. We take the position the documents are in violation of Rule 56, (c) and (e), of the Federal Rules of Civil Procedure.

The Court. What are those rules?

Mr. Burwell. Rule 56 (c) Your Honor:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact - "

and so on. We take the position that these fall into none of those categories.

The Court. They are affidavits.

Mr. Burwell. They are not sworn to. They are certified as being part of a record. Then 56 (e), that is the form of the affidavits. So if they are not [are?] construed by Your Honor to be affidavits, they do

5 not fill any of the requirements, because the Rule 56 (e) says:

"Supporting and opposing affidavits shall be made on personal knowledge."

I think Your Honor will readily see there is no personal knowledge, - Mr. Howrey doesn't purport to swear to anything. And they "shall set forth such facts as would be admissible in evidence". We contend they would not be admissible in evidence.

"And shall show affirmatively that the affiant is competent to testify to the matters stated therein." -

which they do not. They are unsworn documents, just picked up willy-nilly from the Federal Trade Commission files to give a partial version of the facts. And the only certification I could find is by some secretary that they were part of the files.

Mr. Ryan. Your Honor, might I say something? Plaintiff's counsel has evidently totally overlooked the provisions of the Rules of Civil Procedure 44, which allows proof of official record to be made by the person having custody of these records. There is an affidavit, Your Honor, made by Mr. Hull, who certifies that he is the custodian of these records.

6 The Court. That is what I am looking for. Is it here?

Mr. Ryan. It is there, Your Honor.

The Court. How does Rule 44 read? (The rule was handed up). This is a certificate, not an affidavit.

Mr. Ryan. I think it provides for a certificate by a custodian, Your Honor.

The Court. Let us see whether it does. It provides for a certificate; that is all that is required.

Mr. Burwell. If Your Honor please, I would like to call Your Honor's attention to the case of Gordon [Goldman] versus Summerfield, in 214 Federal (2d) * * *, We take the position, Your Honor,

* * * that it fails to conform with 56 (e), because the evidence would not be admissible. If I may invite Your Honor's attention to "Notice to the Staff," signed by Mr. Edward Howrey, the Chairman of the Federal Trade Commission, after the first sentence the entire thing is a quote from an unidentified budget officer, whose identity we don't know. And it is just a lot of figures that could not possibly be competent
7 evidence. It is a self-serving declaration and hearsay. I believe that is our position with reference to 56 (e), sir.

The Court. Very well. I will consider the record as appropriate in the consideration of the motion.

* * * * * * *

Reporter's Certificate

This excerpt is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Thomas O'Neal

750 [Filed May 4, 1956]

ORDER

"The above-entitled cause having come on for hearing on defendants' motion for summary judgment and plaintiff's opposition thereto, and plaintiff's motion to amend the complaint, and defendants' opposition thereto, and it appearing to the Court that there is presented by the pleadings and from argument of counsel that there is no genuine issue as to any material fact, and it further appearing that plaintiff's proposed amendments to the complaint do not state new facts but merely elaborate facts already stated by the complaint, it is this 4th day of May 1956

ORDERED that defendants' motion for summary judgment be and the same hereby is granted, and the complaint is hereby dismissed.

FURTHER ORDERED that plaintiff's motion to amend the complaint be and the same hereby is denied.

/s/ F. Dickinson Letts,
Judge

---

753 [Filed June 21, 1956]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Notice is hereby given that Oliver W. Toll, the plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the fourth day of May, 1956, granting defendants' motion for summary judgment and dismissing the complaint, and denying plaintiff's motion to amend the complaint;

And plaintiff appeals from each part of said judgment and order, including (a) the denial of plaintiff's motion filed March 9, 1956, to amend the complaint, and (b) the granting of defendants' motion for summary judgment and the entry of judgment thereon dismissing the complaint;

And plaintiff also hereby appeals from each and all of the following interlocutory judgments or orders theretofore entered in this action, to-wit: (1) the order and judgment of the Court entered on March 3, 1955, dismissing the complaint insofar as it related to Albert A. Carretta; and (2) the order of Court entered April 11, 1956, and each part thereof, including (a) the denial of plaintiff's motion to continue the hearing on the motion for summary judgment, (b) the denial of plaintiff's motion to compel the appearance of Robert M. Parrish for deposition, and (c) the denial of plaintiff's motion to compel defendants to answer interrogatories.

/s/ Clayton L. Burwell
Attorney for Plaintiff

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,472

OLIVER W. TOLL,

Appellant

v.

JOHN W. GWYNNE, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit
FILED
NOV 13 1956
Joseph W. Stewart
CLERK

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Washington, D. C.
EX 3-0625

No. 13,472

APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

1. Whether rights of retention in employment, and of reemployment, conferred on an employee by the Veterans' Preference Act of 1944, may lawfully be eliminated or restricted by Civil Service Commission regulations by reason of the employee's occupancy of an "excepted" position.

2. Whether Civil Service Commission regulations may lawfully provide that in certain types of competition between employees in a reduction in force two of the statutory criteria of competition (seniority and efficiency ratings), which are considered in other types of competition, shall not be considered.

3. Whether a dismissal in a reduction in force may be invalidated: (a) by refusal of the Civil Service Commission to hear evidence on the issues presented by the appeal, by consideration of evidence withheld from appellant, by decision by a person not present at the hearing, and by the manner in which the appeal was conducted; or (b) on the ground that the proceedings were conducted as an evasion of merit system protections and were actuated by political purposes.

4. Whether unsworn memoranda certified under Rule 44(a), F. R. C. P., are receivable for the purpose of establishing the truth of their contents in passing upon a motion for summary judgment.

5. Did the District Court properly deny appellant's requests for interrogatories, for deposition of a Government official, and to amend his complaint, and properly enter summary judgment in favor of appellees, in a case in which appellant claimed that he had been illegally denied reemployment, and also that his dismissal in a reduction in force

was invalid by reason, among other things, of ulterior purpose in conducting the reduction, and also in the excessive narrowness of the "level", and that the Civil Service Commission had refused to hear evidence and in other respects had failed to accord appellant due process of law?

6. Did the District Court properly dismiss the action with prejudice as to one of the appellees on the ground that he was not a proper party defendant?

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,472

OLIVER W. TOLL,

Appellant

v.

JOHN W. GWYNNE, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia granting summary judgment for the appellees (JA 135).

Jurisdiction of this case below was based, as appears from the complaint, on Section 11-301, 11-305, 11-306 and 11-325 of the District of Columbia Code; Sections 1331, 2201 and 2202 of Title 28, and Section 1009 of Title 5, of the United States Code (JA 3), and on the Fifth Amendment to the Constitution of the United States (JA 15).

Jurisdiction to review the judgment of the District Court is conferred upon this Court by the Act of June 25, 1948, c. 646, 62 Stat. 929, 930, as amended, Title 28 U.S.C.A. Sections 1291, 1294.

STATEMENT OF THE CASE

Nature of the case.

This suit involves the rights of a "preference eligible", under the Veterans' Preference Act of 1944, as to retention in employment in a reduction in force, as to reemployment, and as to an administrative hearing before the Civil Service Commission. Plaintiff claims: that his dismissal resulted from application of provisions of the Civil Service Commission regulations which were in violation of the statute; that the validity of his dismissal also turned upon questions of fact which were appealable to the Civil Service Commission, but on which the Civil Service Commission denied plaintiff any reasonable or fair hearing; and that in violation of the Act plaintiff was denied reemployment. The case is here on appeal from a summary judgment in favor of defendants, rendered by the District Judge from the bench without opinion.

Federal Trade Commission reduction in force proceedings

In September, 1953, plaintiff was employed as an attorney on the staff of the Federal Trade Commission, in grade GS-11. He had civil service "status", and had had 16 years (including military service) of Government service.

Under Reorganization Plan No. 8 of March 13, 1950, the administrative control of the Federal Trade Commission, previously in the Commission, was vested in the Chairman; and the Chairmanship was made dependent on the will of the President.[1] In that situation, Mr. Edward F. Howrey on April 1, 1953, took office both as a new member of the Commission and as its Chairman. He was at once concerned about what positions might be made available for appointments, as he was under

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[1] Hearings on the Federal Trade Commission, July, 1955, before Subcommittee No. 1 of the Select Committee on Small Business of the House of Representatives, page 24. Copies of that Report have been filed with the Clerk of this Court.

"unbelievable pressure" to find jobs for people. R 538, JA 107. At a meeting of the Commissioners on August 11, 1953, a question was raised as to certain of Mr. Howrey's appointments. Commissioner Mead expressed concern about the trend toward putting political appointees in key spots, also the business of layering, creating two jobs where only one grew before. R 509, JA 101. Thereupon (as reported by Commissioner Spingarn):

> "The Chairman became quite angry. He said that he had been resisting enormous pressure from the Republican National Committee, that they had 8,000 applicants over there for whom they were seeking jobs, that he had made very few appointments here at the Commission, and since he was Chairman he was entitled to the support of the Commission on such matters, and that if Mead and I were not going to support him in such matters he could play tough too and start making a lot of changes around here or words to that effect. * * *" (R 509, JA 101).

The day before Mr. Howrey made those remarks to the Commission, Mr. John A. Delaney (a defendant in this action), an expert in reductions in force (R 250, JA 66; cf. R 783, JA 20), had been brought over to the Federal Trade Commission (R 781, JA 20) to supersede Mr. McAdams (R 539, JA 107), who had been Assistant Director and Director of Personnel for over four years. JA 106. The decision to conduct a reduction in force had already been made. R 791, JA 23. About three weeks later issuance of reduction in force notices had begun[1], but without authorization from the board of Commissioners. R 505, JA 98-99.

A justification for the reduction in force was set forth in a mimeographed "Notice to the Staff, Re: Extent of Reduction in Force", signed by Mr. Howrey, dated September 3, 1953. JA 41-43. It quoted a memorandum, but not a signature, stated to have been received from "the budget officer". Included in the quotation were computations[2], including

---

[1] Irene Till was separated by reduction in force September 30, 1953. R 518. The 30-day notice must have been issued on or before August 31, 1953.

[2] The computations were currently criticized for omitting the large and obvious factor of "attrition". Cf. JA 102; R 512-513.

a figure for "Estimated Deficit to be Made Up in 9 Months" of $143,200. JA 43. Other estimated payroll items (overtime pay, within-grade promotions, and terminal leave payments) aggregating $49,000, were added [$143,200 plus $49,000 equals $192,200]. There was also added a further $30,000 for "Promotions and other Contingencies". In terms of annual salaries (magnified above the estimated deficit because part of the fiscal year had already elapsed) a proposed $270,000 cut was shown.

Some 50 or 60 employees received reduction in force notices. R 759, JA 87. Apparently some 31 (or 37, if those ordered displaced by orders of the Civil Service Commission are included[1]) lost their positions as a result of the reduction in force. Cf. "Howrey Exhibit G": Small Business Committee Hearings, pages 40-42; R 517-524. The desired payroll reduction was closely approximated. R 814, JA 30. In a few months it was recognized that there was a prospective surplus for the fiscal year in the neighborhood of $200,000 (R 506, JA 99). [Compare the figure $192,200, supra.] Thereupon many promotions were made and many new employees were hired. A list of new employees appears at R 517 to R 524, JA 128 to JA 130; Hearings, "Howrey Exhibit B", pages 31-32.

Extent of plaintiff's "competition".

The carrying out of the reduction in force began with a list of employees who were to be "reached". R 540, JA 108. A "retention register" (R 788, JA 22) was prepared, showing all of the positions in the agency (R 789, JA 22), their arrangements by "areas", "series", and "levels", and the "retention standing" of the incumbents. R 725, JA 21. Its classification showed a large number of "areas", and over 100 "levels" (JA 12), so arranged that over 40% of the attorneys of the Commission were "low men" in their "levels". JA 53. Such an arrangement facilitated reaching individuals. R 540, JA 108. Mr. Delaney sought advance authorization for his arrangements, and consulted Mr. E. A. Dunton, of the Civil

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[1] The displacement orders from the Civil Service Commission were not caused by the reduction in force, and therefore would have occurred anyway.

Service Commission (R 806, JA 28), who later decided plaintiff's reduction in force appeal. R 24, JA 13.

According to Mr. Delaney's testimony on deposition, the process of selecting which employees should be dismissed was done by allocating to each bureau, on the basis of its payroll, its pro-rata share of the desired total payroll cut (R 812, JA 29; R 786, JA 22); and each bureau director then determined where, within his bureau, the cut would fall. R 812, JA 29. As to attorneys in so-called "excepted" positions, merely by looking at the retention register it was possible to determine which men were vulnerable (R 813, JA 29), and would be leaving. R 812, JA 29. Mr. Delaney's conferences were "almost in terms of names". R 787, JA 22. Mr. Delaney was asked, as to the bureau director, —

> "Q. How was his decision determined to fire one or another of these vulnerable men?
> A. You would have to ask him." (R 813, JA 29-30)

Mr. Horton, the Director of the Bureau in which plaintiff was employed, testified that he had no part in the selections for dismissal. R 821-823, JA 81-82. Mr. Delaney told Mr. Horton that plaintiff might have to be dismissed (R 821, JA 81); and Mr. Delaney's office instructed Mr. Horton to deliver the dismissal notice to plaintiff. JA 82.

Upon receiving his dismissal notice, plaintiff asked to be permitted either to be furloughed temporarily until new attorneys were being employed, or to take a reduction in grade from GS-11 to GS-9, where his right to compete with others who had lesser "retention standing" than his could not have been disputed. R 558, JA 122-123. Both requests were denied. Mr. Parrish, Mr. Howrey's Executive Director, stated: "A lower level position has not been tendered to you", and explained that placing plaintiff on leave without pay did not accord with the Commission's policy. JA 124-125.

Plaintiff promptly filed written requests for reemployment with the Federal Trade Commission (JA 123), and the Civil Service Commission (JA 111-112). JA 16, 38. Plaintiff was never offered any reemployment. JA 16.

Civil Service Commission Appeal.

Plaintiff asked to examine the "retention register", prepared as basis for conducting the reduction in force. Secretaries in the Personnel Office showed him copies of some pages, including the one on which his name appeared (R 551), but he was denied an examination of the register. JA 13. Some months later, but before the Civil Service Commission hearing, Mr. Delaney again refused permission to examine the register, but offered to show plaintiff the page in the register on which plaintiff's name appeared. JA 105-106. Refusal to permit examination of the register was one of plaintiff's grounds of objection in his appeal to the Civil Service Commission. JA 93-94; JA 88-89. Plaintiff also objected that the "level" and "area" involved were too "narrow" and did not conform to the facts of the agency's operations (R 551, JA 118; R 553-554, JA 119-120; R 499-500, JA 94), and that plaintiff should have been placed in the same level with Messrs. Sloan and Hubler, who held GS-9 positions, but whose work and services were interchangeable with plaintiff's (JA 119-120), as cases were transferred frequently and indiscriminately between attorneys in grades 12, 11, and 9. JA 120. Other objections to the reduction in force proceedings, which are detailed below in this brief, were also included in the appeal. R 551-554, JA 118-120.

At the hearing plaintiff was represented by Mr. Claude L. Dawson, assisted by Mr. Austin H. Forkner, who had been dismissed in the same reduction in force. JA 87. Plaintiff's attempts to introduce testimony in support of his appeal were prevented as to each ground of appeal. JA 88-91, 93-95. The presiding officials relied principally upon reports of investigators. JA 90, 94. The investigators were not present, and plaintiff was not permitted to see their reports. JA 93-94, 88-89. No transcript of the proceedings was kept or permitted to be made. JA 92; R 761, JA 87-88; R 776, JA 91. To exclusions of evidence, secrecy of evidence, refusal of transcript, and other aspects of the hearing, plaintiff and his counsel duly objected, claiming protection of the due process clause of the Fifth Amendment. R 769, JA 90. On April 9, 1954, decision against plaintiff was rendered by the Mr. E. A. Dunton, who had not been

present at the hearing. JA 37.

Thereafter Mr. Blann of the Commission's "Board of Appeals and Review" affirmed and reaffirmed. On November 17, 1954, he rejected plaintiff's attempt to appeal to the Board of Commissioners. R 547, JA 114.

District Court Proceedings: plaintiff's attempts at discovery.

Action in the United States District Court of the District of Columbia was filed January 26, 1955. Plaintiff took depositions of defendant John A. Delaney (JA 20-31, JA 31-34), and of Mr. James A. Horton (JA 80-86). Defendants filed no answer until February 29, 1956 (JA 34), after having been in default for periods aggregating about nine months. JA 117. On March 2, 1956, defendants moved for summary judgment. JA 39-40. The Commissioner of Veterans' Cases rendered a careful 11 page opinion, recommending that defendants' motion be not granted. JA 65-74.

While the motion for summary judgment was pending, plaintiff filed interrogatories (JA 56-58), took the deposition of Mr. Austin H. Forkner (JA 87-91), and attempted to take the deposition of Mr. Robert M. Parrish (JA 62-64), who had been Executive Director at the time of the reduction in force. Mr. Delaney had testified that Mr. Parrish had been involved in the decisions regarding selection of employees for dismissal, (JA 22, 23, 29) and had been a member of the committee (JA 25) which, following the reduction in force, decided on new attorney appointments. In connection with the Parrish deposition plaintiff subpoenaed the agency's "Attorney Register" (R 247, JA 63), supposedly the basis for employment of attorneys following the reduction in force, and the only source of some of the evidence relative to plaintiff's claims for reemployment. JA 25. There were objections (JA 61-62; R 264-265) and replies (JA 74-77; R 277-279, JA 79). Mr. Parrish failed to appear at the time and place set for his deposition. R 272-275, JA 79. Plaintiff moved to compel the deposition of Mr. Parrish, to require answers to the interrogatories, and to continue the hearing on the motion for summary judgment until plaintiff should have had an opportunity to obtain the information thus sought. JA 77-78. The District Court denied plaintiff's motion in entirety, holding

that the information sought would in each instance be "immaterial to the cause of action and vexatious to the defendants". JA 86-87.

Material before the District Court when granting summary judgment.

With defendants' motion for summary judgment, defendants filed certificates by officials of the United States Civil Service Commission (R 162, JA 40) and of the Federal Trade Commission (R 177-182, JA 44) certifying various attached papers as being copies of papers in their respective files. None of these papers were made under oath or submitted by sworn statements. Defendants also filed two affidavits by defendant John A. Delaney. JA 46-47. Plaintiff objected to the consideration of the papers submitted solely by certificate on the ground that they were not such material as by Rule 56(c) and (e), F. R. C. P., may be considered by the Court on a motion for summary judgment. JA 60; JA 132-134. Overruling the objections, and relying on Rule 44(a), F. R. C. P., the Court admitted the papers for consideration. JA 134. Plaintiff filed 10 affidavits (JA 91-128), to which some 29 exhibits were attached. The contents of the submissions by both parties will be discussed under the appropriate headings in this brief. Also pending before the Court was plaintiff's motion to amend portions of his complaint (JA 47-48), supported by affidavit (JA 55-56). A copy of the requested amendments was tendered with the motion. (JA 48-55).

After listening to arguments, the District Judge announced from the bench his decision in favor of defendants on the motion for summary judgment, and denied plaintiff's motion to amend. Order pursuant to that decision was entered May 4, 1956. JA 135. The District Judge did not discuss the opinion of the Commissioner of Veterans' Cases. There was no written opinion by the Court. Plaintiff filed notice of appeal June 21, 1056, JA 136-136. The case was docketed in this Court July 31, 1956.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED.

The Fifth Amendment to the Constitution is involved. The material portion is set forth in the Supplement to this Brief.

The statutes of principal relevance to this case are: The Veterans' Preference Act of 1944, Act of June 27, 1944, 58 Stat. 387, 5 U.S.C.A. (Cum. Supp.) Sec. 851, et seq.; the Civil Service Act, Act of January 16, 1883, c. 27, 22 Stat. 403, 5 U.S.C.A. Sec. 632, et seq.; Act of March 27, 1922, c. 116, 42 Stat. 4701, 5 U.S.C.A. Sec. 670. The material portions are set forth in The Supplement to this Brief.

Regulations principally involved are Civil Service Commission Retention Preference Regulations for Use in Reductions in Force, Part 20 of Title 5, Code of Federal Regulations. The material protions are set forth in the Supplement to this Brief.

STATEMENT OF POINTS

1. Appellant was entitled to the rights conferred by the Veterans' Preference Act without denial or diminution by reason of his occupancy of an "excepted" position.

2. Appellant was entitled to be retained in employment in a position for which he was fully qualified and available, when his retention standing was superior to that of other competing employees.

3. Appellant was illegally denied reemployment rights conferred by the Veterans' Preference Act.

4. Appellant's dismissal was invalidated by violations of due process of law in the Civil Service Commission proceedings, and by the ulterior purpose of the reduction in force.

5. In the light of the material before the District Court the rulings and judgment of the Court were erroneous.

SUMMARY OF ARGUMENT

The rights asserted in this case by plaintiff to retention in his government employment in a reduction in force, and to reemployment thereafter, are based on the statutory grant of those rights by the Veterans' Preference Act of 1944. For that reason prior cases which, in the absence of a statutory grant, have questioned rights of retention in employment do not render doubtful the judicial enforceability of plaintiff's claims.

The provisions of the Veterans' Preference Act, supported by its legislative history, show that in that statute merit system procedures which, at the time the statute was enacted, existed largely by virtue of Executive order and were therefore revocable at the will of the Executive, were transformed into statutory rights protected against executive impairment. Those rights are of great value to veterans, and also subserve public policy in tending to maintain the principles of the merit system in the civil service.

Section 2 of the Veterans' Preference Act explicitly provides that the rights given by the statute shall extend to the "unclassified service", which is now called the "excepted service". Section 12 of the Act accords to "competing employees" a standard of competition which is to be applied in determining retention in employment in cases of reduction in force. In referring to "competing", the statute referred to an obvious fact inherent in the subject matter about which Congress was legislating, namely, that in a reduction in force situations of competition arise between employees between whom there is a choice. The fact of choice arises from the possibility of making selections from among those members of the staff who are reasonable possibilities for retention in the continuing positions.

That meaning of the word "competing" was recognized by Fass v. Gray, 91 U.S. App. D.C. 28, 197 F.2d 587, 591 (1952), cert. den. 344 U.S. 839, in construing Section 12. It is also recognized in the regulations which have been promulgated under the Veterans' Preference Act

(Part 20 of Title 5 of the Code of Federal Regulations). Thus, Sec. 20.2(c) of the regulations states:

> " ' Competing employees' for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position. "

Similarly Regs. Sec. 20.2(d) furnishes a definition of the term "qualified" which is consistent with that meaning of "competing employees". This primary meaning of the term "competing" as used in Section 12 is not inconsistent with a further implication of that term, as used in the proviso of Section 12, which is described in Elder v. Brannan, 311 U.S. 277, 283 (1951).

At the time when plaintiff was dismissed in reduction in force proceedings conducted by the new Chairman of the Federal Trade Commission in September and October of 1953, plaintiff was fully qualified to serve in at least two continuing positions in the agency. They were positions which were practically identical with the position which plaintiff at the time was occupying, although they were of a lower grade. These positions were in the same bureau, division, section, and line of work in which plaintiff was employed. Under the facts existing in that bureau, there was a great degree of interchangeability of functions between employees, and of employees between functions, so that employees of various grades, including those both above and below the grade held by the plaintiff, were used interchangeably in the work of the Bureau. JA 120.

Section 12 of the Veterans' Preference Act provided that the standard of competition which it introduced as a substitute for the uncontrolled administrative choice which had theretofore existed, in a reduction in force, as between competing employees should be formulated by regulations "giving due effect" to four criteria specified in Section 12, namely, tenure of employment, military preference, length of service, and efficiency ratings. Those four criteria were given effect by the regulations by a formula which in general required successive application of the statutory criteria. That statutory standard of competition, as thus crystalized by

the regulations, was termed "retention standing". Reg. Sec. 20.2(g) defines that standard as follows:

> " ' Retention standing' means precise rank among competing employees for a continuing position, by retention group and subgroup, and by retention credits within each subgroup."

By reference to the provisions for constituting "groups", "subgroups", and "retention credits" (Regs. Sec. 20.4), retention standing is determined by successive tests of: tenure; military preference; and (combined) seniority and outstanding efficiency ratings, in that order.

As between the plaintiff and the incumbents of the positions, above mentioned, for which the plaintiff was qualified, the plaintiff had superior retention standing, since he was on a par with the others as to the first two criteria (tenure and military preference), but had superior retention standing in respect to seniority ("length of service") and outstanding efficiency ratings, as jointly considered.

Plaintiff asserted his right to compete for the positions in question, and emphasized it by a specific request for a demotion to the same grade occupied by the competing employees who were then incumbents of the positions. His request was denied and plaintiff was discharged, while the other employees were retained in their positions. A further request by plaintiff to be permitted to be furloughed temporarily without pay until the agency began to employ new attorneys was likewise denied. JA 125.

The refusal to give the plaintiff the benefit of his superior retention standing as against others who were competing employees for the same positions was a direct violation of the grant of Section 12, that employees should be entitled to compete for positions for which they were fully qualified according to the statutory standard of competition which the statute substituted for prior administrative discretion.

It is immaterial by what process the denial of plaintiff's statutory rights was accomplished. Where there is a clear violation of the statute it is not necessary to follow the windings of executive rulings in order to

discover exactly where the violation occurred. Roth v. Brownell, 94 U.S. App. D.C. 318, 215 F.2d 500, 502 (1954), cert. den. 348 U.S. 863.

However, the violation of the statute did occur as a result of complicated procedures covering the mechanics of selection for retention in the case of reduction in force, which introduced two discriminations, both of which are illegal. One is a discrimination against employees occupying "excepted" positions which denies them the right to compete for positions for which they are fully qualified, except with regard to a small number of positions which are identified as contained in a single "level", a creation of the regulations' procedure not indicated in the statute. The other discrimination consists in entirely eliminating from the statutory standard of competiton, as formulated in Reg. Sec. 20.2(c), the two criteria of seniority and outstanding efficiency ratings in most cases where the position in question is not represented in the same "level" to which the competitor (the one seeking to assert his rights of competition under the statute) has been relegated. That elimination of an important part of the statutory standard of competition is without warrant, reduces the right of competition given by the statute, and is particularly obnoxious to the statute and to proper personnel administration in destroying the criteria most essential to employee morale, -- seniority and outstanding efficiency.

Plaintiff made due application for reemployment. Under Sections 15, 7 and 8 of the Veterans' Preference Act, as an employee discharged without fault plaintiff was entitled to reemployment preferences as against new applicants. A few months after the reduction in force a large number of new employees were brought into the agency in positions for which plaintiff's qualifications had been established. Plaintiff's rights of reemployment under the Veterans' Preference Act were denied solely on the ground that the plaintiff, although possessed of competitive status, and thus meeting the standards required for appointment to a "competitive" position, had occupied at the time of his dismissal an "excepted" position.

A similar refusal of reemployment was made by the Civil Service Commission upon the same ground.

The theory that the Civil Service Commission can thus curtail the rights of reemployment and of retention in employment granted by the Veterans' Preference Act has no justification. It proceeds upon the supposed right of the Executive, by "excepting" positions, thereby to disenfranchise them from merit system protections of every character. There is no reasonable basis for that claim. The power to "except" positions is derived from a permission in Section 2 of the Civil Service Act, of January 16, 1883, 5 U.S.C. 632, et seq., to create "necessary exceptions" from the carrying out of the provisions of that Act. 5 U.S.C.A. 633. As applied to "Schedule A" positions, such as the one occupied by the plaintiff, the "excepting" of the positions is limited to the elimination of the requirement that appointments to such positions shall be made through competitive examinations. The elimination of that merit system provision does not carry with it automatically the elimination of all other merit system protections. Moreover, it is absurd to construe an exception from a provision of the Civil Service Act as carrying with it the power to remove merit system protections given by the Veterans' Preference Act, - passed for the purpose of establishing merit system protections beyond the reach of Executive abrogation. The Veterans' Preference Act contains no permission to the Executive to nullify its provisions. And the Veterans' Preference Act specifically applies its grants of merit system protections to "excepted" positions, thus contradicting the claim that incumbents of "excepted" positions may be discriminated against with respect to its provisions.

Plaintiff's dismissal from the service was further invalidated by serious defects in the procedures of an administrative appeal to which plaintiff had a right. Although plaintiff's right of appeal to the Civil Service Commission apparently did not include remedies with respect to illegalities of the Civil Service Commission's regulations, at least

plaintiff had the right to appeal the factual issue as to whether his relegation to a level in which only three continuing positions were represented was factually in accordance with the regulations. On that issue, as well as upon all other issues except the comparison of plaintiff's retention standing with that of three other employees, plaintiff was denied the right to introduce evidence at the hearings. Many facts could have been introduced on that issue had it been permitted. Such a denial of fair hearing on an issue material to plaintiff's statutory rights, on which plaintiff's livelihood depended, is a denial of due process of law. Plaintiff's rights to due process were asserted as to all of the proceedings in the Civil Service Commission appeal.

Plaintiff was also denied the right granted by Regs. Sec. 20.4(d)(3), and essential to a due process hearing, to examine the retention register prepared in connection with the reduction in force. Neither inspection of copies of some of the pages of the register, nor opportunity to see the single page of the register on which plaintiff's name appeared, complied with plaintiff's right to examine the register as a whole, since such an examination was necessary to any reasonable opportunity to contest the issue whether positions which should have been included in the same level had been excluded. An affidavit by defendant Delaney on this point, containing a qualified and ambiguous contradiction of plaintiff's allegations, is not a proper basis for eliminating those allegations in the complaint, particularly as Mr. Delaney's affidavit was impeached by additional evidence offered by plaintiff at the hearing. JA 105, 93, 23.

The procedure of the Civil Service Commission appeal likewise violated due process: (1) in that the decision was made by a person not present at the hearing and without an adequate record on which to base his decision; (2) in the inconsistency between that person's roles in participating in arrangements for the reduction in force and thereafter deciding upon its regularity; (3) in the consideration and reliance upon evidence which, without reasonable grounds for secrecy, was kept concealed from plaintiff; (4) in the general practices of the Civil Service

Commission in concealing facts as to the existence, conduct, and disposition of reduction in force appeals.

A reduction in force which is conducted for the ulterior purpose of vacating positions in order to make them available for political patronage does not supply a valid basis for an employee's discharge.

Considerable evidence supporting the charges of the complaint in that regard (JA 2-3, 14-15; cf. JA 51-53) was before the Court. JA 106-110, 97-100, 100-103, 128-130,and compare JA 81-82, 85, with JA 22-23, 28-30. No contrary evidence was introduced except an unsworn memorandum, almost entirely hearsay, introduced in reliance upon Rule 44(a), F. R. C. P., over appellant's objections (JA 132-136) that Rule 44(a) facilitates the identification of papers but does not import verity to matters alleged in them, so as to meet the evidential standards required by Rule 56 as a basis for summary judgment.

The administrative hearing by the Civil Service Commission does not bar judicial redress, since most of the issues in this case are outside the scope of the consideration given at the administrative hearing, and also since in his appeal plaintiff did not receive a fair hearing or due process of law.

Plaintiff's claims involve various factual issues not adequately (if at all) controverted by defendants' submissions. The summary judgment for defendants therefore violates the rule that, unless it appears to a certainty that no evidence can be produced which would establish his case, a plaintiff cannot be foreclosed from his right to a trial upon his claims.

Plaintiff's claim that he was illegally refused retention in employment in the positions of lower grade in the Bureau in which he was employed are established by the record, and entitle plaintiff to judgment thereon.

ARGUMENT

I.

THE VETERANS' PREFERENCE ACT HAS GIVEN VETERANS ENFORCEABLE MERIT SYSTEM RIGHTS.

The Veterans' Preference Act of June 27, 1944, 5 U.S.C.A. (Cum. Supp.) Sec. 851, et seq., carried forward a legislative policy, in aid of proper civil service administration, to accord Government employees protected rights. Cf. Civil Service Act of 1883, 5 U.S.C.A. Sec. 632 et seq., especially Secs. 2(2) Fifth and Sixth, Sec. 5, Sec. 7; Lloyd-La Follette Act of August 24, 1912, 5 U.S.C. Sec. 652. Cf. Roth v. Brownell, 94 U.S. App. D.C. 318, 215 F.2d 500 (1954), cert. den. 348 U.S. 863.

When H.R. 4115, which became the Veterans' Preference Act of 1944, was debated in the House of Representatives on April 7, 1944, Mr. Ramspeck stated (Cong. Rec., pp. 3562-3563) in connection with provisions giving preference to veterans in employment:

> "* * * It is true, Mr. Speaker, this act does not make a great many changes in the present veterans' preference, which exists largely by Executive order, but it is important, I think, that those Executive orders be given legislative status by Congress. [1]

Although somewhat commingled in the statute, the benefits given veterans by the Veterans' Preference Act are of three kinds, viz.: (1) rights of preemption (of certain sorts of Government employments, cf. the proviso of Section 3); (2) rights of preference (over nonveterans, cf. Sections 3, 7, and 12); and (3) merit system rights. In the provisions which confer rights of preemption and of preference the policy of the Veterans' Preference Act may perhaps be questioned, for in such arrangements the public's debt to servicemen seems to be paid at the cost

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[1] Here, and subsequently in this brief unless otherwise noted, emphasis has been supplied.

of others. But the provisions which merely establish merit system procedures do not conflict with other public interests: they coincide. Their only cost is a decrease in political spoils.

Section 8 of the Veterans' Preference Act, down to the proviso, is essentially a statutory enactment of the then current rules for making appointments according to standard merit system procedures. The veterans' point preferences were a minor feature: the great benefit to veterans lay in the grant of merit system procedures as a statutory right. The instant case asserts those merit system rights.

II.

PLAINTIFF WAS DENIED HIS RIGHT, UNDER THE VETERANS' PREFERENCE ACT, TO COMPETE FOR RETENTION IN EMPLOYMENT IN POSITIONS FOR WHICH HE WAS FULLY QUALIFIED AND TO WHICH IT WAS PRACTICABLE TO ASSIGN HIM.

Section 12 of the Veterans' Preference Act gives veterans a right of competition in a reduction in force. The body of Section 12 provides:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings * * *."

Stated in terms of requiring who shall be "released", the statute in substance is concerned with the converse requirement, —retention. The competing veteran's right is to be retained where within his field of competition his order of ranking entitles him to it. The regulations are termed "Retention Preference Regulations", and refer to "retention standing", "retention credits", etc.

Section 12 furnishes a statutory standard of competition, to be used where theretofore in a reduction in force management had enjoyed uncontrolled discretion to select which employees should be dismissed.

The word "competing" was used in Sec. 12 in the light of the actualities of the reduction in force situations which the statute regulated. By "competing", Section 12 referred to the obvious fact that in a reduction in force situations arise where there is in fact a choice as to which employees shall be retained and which dismissed. It is the possibility of choice that produces the competition. The employees may not "compete" in the commonest meaning of that word, implying personal efforts by the competitors ("To contend emulously * * *", etc.: Webster's New Int. Dictionary (2d ed., 1940)), but they do "compete" in another sense, viz., "To stand comparison, in respect of fitness or value * * *." (idem) It was obviously to that situation and to that competition that Section 12 referred.

Thus in Fass v. Gray, 91 U.S. App. D.C. 28, 197 F.2d 587, 591 (1952), cert. den. 344 U.S. 839, this Court said: "The Regulation here involved, requiring that an employee be 'fully qualified' for a position, is a reasonable interpretation of 'competing' as used in the 1944 Act and in the Executive Orders preceding its enactment. * * * *". Again: "The terms 'competing employees' or 'employees in competition' have long been interpreted to include the factor of location * * * *". These two considerations, —whether an employee is really qualified to do the job, and whether it is practicable to put him in the available position, —thus noted by the Court in the Fass case, are clearly the sort of considerations adverted to by Congress by the word "competing".

That situation — that as to any position there may be a sphere of legitimate choice — Section 12 recognized, and did not disturb. Prior to the Veterans' Preference Act, who were "competing employees" for a position was a question of fact: it remained the same question of fact thereafter. The term "competing employees" as used in the body of

Section 12, referred to such situations of fact.[1]

The regulations, likewise, have recognized that the meaning of the term "competing employees" depends on the factual question whether various employees are each usable in the same position, so that management may choose between them. Thus Regs. Sec. 20.2(c) and (d) state:

> "(c) 'Competing employees' for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position.
>
> "(d) 'Qualified' for a position means having the basic education and experience, and such special skills and aptitudes as are necessary, to take over the position in a reduction in force and render satisfactory service without undue interruption to the work program."

At the time of his dismissal plaintiff was reasonably a possibility for retention in at least two continuing positions on the staff of the Federal Trade Commission, namely, the positions occupied by Messrs. Sloan and Hubler in the same bureau, division, section, and line of work in which plaintiff was employed. JA 7. Those positions were practically identical with plaintiff's. JA 31-34. Like the plaintiff's, they had been classified as "excepted". JA 7. Plaintiff was fully qualified to serve in either of those positions and to perform their functions without interruption to the work progress. JA 7. Those positions, however, were graded as GS-9, whereas plaintiff's position had a slightly higher grade, GS-11.

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1 Elder v. Brannan, 341 U.S. 277, 283 (1951) emphasized a further implication of the term "competing employees", as used in the proviso of Section 12, beyond its basic meaning described hereinabove, namely, its incorporation of the prior practice in reductions in force procedures of giving priority to the criterion of tenure over that of military preference. The basic meaning of the term herein described and as recognized in Fass v. Gray, supra, is not contradicted by the additional significance attributed by the Elder case to its meaning in the proviso.

Plaintiff's request (JA 123) for a demotion to GS-9, so that his salary grade would be identical with that of Messrs. Sloan and Hubler, was denied on the ground that the reduction in force regulations did not require, in the case of an "excepted" employee, that he be permitted to compete for positions "of a lower grade level". JA 125. Messrs. Sloan and Hubler were retained in the reduction in force although plaintiff was dismissed. JA 7-8. However no suggestion has ever been made that plaintiff was not in fact fully qualified for the positions in question, or that there was any impracticability in his assignment to them. JA 125. Since plaintiff was fully qualified for the positions occupied by Messrs. Sloan and Hubler, and no practical reason prevented his assignment to either of them, he was a "competing employee" for those positions within the meaning of Section 12, as construed by Regs. Sec. 20.2(c) and (d).

By the test of "retention standing" plaintiff was entitled to retention in employment as against Messrs. Sloan and Hubler, for plaintiff's retention rights were superior. JA7. Section 12 of the Veterans' Preference Act provides that the standard for determining retention in employment shall be "regulations which shall give due effect" to the four criteria which Section 12 specifies. Regs. Sec. 20.2(g) defines that standard as follows:

> " 'Retention standing' means precise rank among competing employees for a continuing position, by retention group and subgroup, and by retention credits within each subgroup. "

"Retention groups" give effect to the criterion of tenure. Regs. Sec. 20.4(c). "Subgroups" give effect to the criterion of military preference. Cf. the last sentence in each of subdivisions (1), (2), and (3) of Regs. Sec. 20.4(c). "Retention credits" are defined by Regs. Sec. 20.2 (h):

> " 'Retention credits' are credits for length of Government Service and performance ratings. "

Cf., also, Regs. Sec. 20.4(d)(1). Thus it is "retention standing" (Regs. Sec. 20.2(g)) which gives "due effect" to the four criteria specified in Section 12.

Plaintiff's retention standing was superior to that of Messrs. Sloan and Hubler, since all three employees were equal in respect to the criteria of "tenure" and "military preference"; but plaintiff was entitled to at least 16 "retention credits" (which give effect to the statutory criteria of length of service and efficiency ratings, Regs. Sec. 20.4(d)(1)) as against 14 and 7 for Messrs. Sloan and Hubler, respectively. JA 7. Moreover plaintiff had civil service "status", whereas Mr. Hubler did not. JA 7.

The facts therefore presented a clear case of positions within plaintiff's proper field of competition — positions for which plaintiff was reasonably an alternative, a possible choice for retention in employment — and as to each of which plaintiff possessed superior retention standing (Reg-Sec. 20.4(d)(1)) as against the competing employees (Reg. Sec. 20.2(c)) for the position, to-wit, "the position incumbent, if any, and [any other] employees who are qualified for the position." Regs. Sec. 20.2(c). (The insertion of the words "if any" take care of the case of a new or currently unoccupied position which is being filled at the time of the reduction in force. That might occur in the case of a reduction in force made as a part of the readjustments involved in a reorganization of the agency.)

Since plaintiff was a "competing employee" within the meaning of the statute for each of those two positions, and by the statutory standard was entitled to be retained in one of the positions, it follows that the statute was violated. If the regulations were the cause, then the regulations were necessarily wrong. It should be sufficient to compare plaintiff's rights under the statute with what was done, and by direct comparison note the obvious fact that somewhere a violation of the statute occurred. Such was the straightforward reasoning of this Court in Roth v. Brownell, 94 U.S. App. D.C. 318, 215 F.2d 500, 502 (1954), cert. den. 348 U.S. 863.

However, the manner in which the regulations reached the illegal result may in this case be pointed out, although plaintiff's rights should not be conditioned upon his acumen in identifying the particular instrument of his destruction.

The result reached in plaintiff's case turned on the procedure of a reduction in force. The regulations apparently purport to allow an employee the field of competition to which he is entitled under Section 12 of the Veterans' Preference Act by a procedure in which the employees affected are first classified into groups called "levels". They are then considered for the continuing (or new) positions for which they are qualified by a procedure of two successive steps.

The first step is an intra-level competition, in which an employee is allowed to compete for such continuing positions as are held by employees placed in the same level with him. Regs. Sec. 20.5(b)(1) and (c).

The second step is a "reassignment" competition, that is, an employee who has failed to be retained in the intra-level competition may then compete for any other position for which he is qualified. If he were really allowed to do so, the regulations would thereby afford him the full field of competition to which he is entitled.

However, in fact there are two restrictions on the reassignment competition. One restriction is that no reassignment competition is given to any employee who at the time of the reduction in force is occupying an "excepted" position. The other restriction is that in most cases of reassignment competition no recognition is given to superior retention standing insofar as it is based upon superior rank in seniority and/or outstanding efficiency ratings. Both of those restrictions on the right of a competing employee to compete for positions for which he is qualified are arbitrary and unreasonable.

While both restrictions curtail the statutory right, their manner of doing so is different: the first restricts the field of competition, the second eliminates half of the standard of competition.

The employee has a right to a standard of competition because Congress explicitly substituted the statutory standard for the prior indefinite administrative choice. The statutory standard which was substituted for administrative selection is: "regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings."

Before the statute, each employee was a competing employee with respect to a field of competition composed of all the positions for which he was qualified and available, since in those positions he was a possible choice for retention. The substitution of a statutory standard of competition does not alter the field of positions for which the employee is qualified and available. On the contrary, the statute has adopted that field (in which the employee is a possible choice for retention in employment) as the field where the employee's right to the statutory standard of competition is to apply. That normal field of competition, dictated by the facts of qualification and availability, is a necessary term of the statutory grant, otherwise the grant would have been nugatory, since a right of competition, to have substance, must be defined both by a specified standard and by a field where the standard is to apply.

Thus, to illustrate: In proportion as the statutory standard of competition is curtailed, the employee's right of competition is reduced: in the limiting case, if all the statutory criteria of competition are eliminated the employee's statutory right of competition is destroyed, no matter how many positions there may be for which he is qualified and available. Similarly, in proportion as the field of positions for which an employee may compete is restricted, his right of competition is again necessarily

reduced: in the limiting case, if he is not permitted to compete for any position his statutory right of competition is worthless, no matter how complete the statutory standard of competition may be.

To receive the statutory right of competition which Congress gave, an employee must therefore receive: (1) the right to compete according to the full statutory standard of competition, without elimination of any of the statutory criteria; and also (2) the normal field of competition, composed of all the positions for which he is qualified and available. If either the statutory standard is curtailed or the normal field of competition is restricted the employee is deprived of what the statute gives him.

When the procedure of conducting a reduction in force deprives "excepted" employees of all extra-level ("reassignment") competition, it eliminates almost all their rightful field of competition, since the positions of the other employees who have been placed within the same level are ordinarily only a small proportion of the continuing positions for which an employee is qualified and available. Ordinarily an employee's qualifications are not limited to those required to handle his current job or others with which, in his present position, there may be interchange of function. Moreover, the more stringently the level is narrowed, the more the bite of the denial of reassignment competition is increased.

Similarly, in eliminating the criteria of seniority and efficiency ratings, the regulations deny an employee his statutory right of competition. In Section 12 Congress was concerned not solely for veterans, but also desired to protect employees who had given many years of service to the Government and whose efficiency had been good. When the Civil Service Commission, without any show of justification, strikes out those criteria over an important part of the employee's field of competition, it denies to employees of seniority and efficiency the rights which Congress has given. Congress authorized the Commission to give the criteria "due effect", but not to eliminate them, or to select which of the statutory

criteria the Commission may choose to effectuate, and which not. The Commission cannot substitute its own standards for those of the statute. Cf. Waite v. Macy, 246 U.S. 606 (1918); United States v. Park Motors, 107 F. Supp. 168, 173 (E.D. Tenn., 1952).

There is no relation between the statutory policy of establishing a standard of competition between competing employees and the restrictions which the procedure of conducting a reduction in force impose on employees in "excepted" positions and on employees whose standing is relatively high with respect to seniority and efficiency ratings. Both of those discriminations proceed from policies unconnected with the statutory policy and at variance with it.

III.

PLAINTIFF WAS DENIED HIS RIGHT UNDER THE VETERANS' PREFERENCE ACT TO BE REEMPLOYED IN PREFERENCE TO NEW APPOINTEES

Section 15 of the Veterans' Preference Act is set forth in full in the Supplement to this Brief. Its first sentence, down to the words "shall have his name placed . . .", describes the conditions for obtaining reemployment rights. The remainder of Section 15 describes the rights thereby obtained. The conditions are:

> "Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed . . .", etc.

From the material before the Court it was clear that those conditions had been satisfied. Plaintiff was a preference eligible (JA 4), separated from employment without delinquency or misconduct on his part (JA 7). Plaintiff made the requisite requests for reemployment. JA 16, 36, 123, 124, 111-112, 126-127. Defendants did not controvert these facts.

In Elder v. Brannan, 341 U.S. 277, 289 (1951), the judgment which this Court had given on plaintiffs' reemployment claims was reversed because plaintiffs had failed to allege a request; but plaintiffs were given leave upon remand to supply the missing allegation. In the instant case that deficiency does not exist. The reemployment rights which accrue to a veteran upon request as aforesaid will now be discussed.

The last sentence of Section 15 of the Veterans' Preference Act reads:

> "No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled."

(The phrase "appointment... from an examination register of eligibles" refers to any appointment of a new employee, as distinguished from a reemployment (from the "reemployment list"), since new appointments are

to be made from examination registers. Cf. Sections 9, 7 and 8.)

After plaintiff's dismissal, new appointments of attorneys were made by the Federal Trade Commission in violation of the provisions of Section 15. JA 16. Mr. Delaney testified to the employment of approximately 50 new attorneys subsequent to the reduction in force. JA 27. He could recall only one case of reemployment. JA 102. That one was not a veteran. R. 805.

A violation of plaintiff's reemployment rights under the last sentence of Section 15 occurred if those new appointments were made when there were two other veterans besides the plaintiff on the reemployment list; unless all new appointments were of 10-point veterans. Cf. Section 15, as quoted above. Mr. Delaney estimated that there were about a dozen veterans on the reemployment list. JA 27. Clearly not all of the new employees were ten-point veterans: Mr. Delaney could not even say that all of them were veterans. JA 27-28.

Plaintiff's allegations in his pleadings were reenforced by the evidence in depositions and affidavits. "Howrey Exhibit B" (JA 128-130; pages 31-32 of the Hearings of the Small Business Committee) shows that in grades 9 and 11 alone (positions for which plaintiff's qualifications had been established, JA 6) the following new attorneys were employed:

Name	Grade
Robert L. Wald	GS-11
William R. Kearney	GS- 9
William R. Somers	GS-11
Kent P. Kratz	GS-11
Philip R. Melangton	GS- 9
Harold L. Horan	GS- 9
Joseph G. Smeraldi	GS- 9
William H. Cook	GS- 9
Ray C. Norvell	GS- 9
Frank M. Whiting	GS- 9
William R. Tincher	GS-11
Robert D. Rolander	GS- 9
Henry G. Pons	GS-11

Name	Grade
Roslyn D. Young	GS-11
Janet D. Saxon	GS- 9
William H. MaHanna	GS-11
William H. Haley	GS-11

Most of these were prior to June 30, 1954. R 584, JA 127-128.

Thus the District Court had before it the names of some 17 new attorney appointments to the Federal Trade Commission staff in positions for which plaintiff's qualifications had been established.

Other violations of plaintiff's reemployment rights were indicated. Section 8 of the Veterans' Preference Act, made applicable to the "unclassified service" ("excepted service") by Section 9, establishes the "rule of 3". If the new attorneys were selected from below the top three, their selections were illegal; and such illegal selections of new attorneys, instead of plaintiff, violated plaintiff's reemployment rights. As to the likelihood that the new appointments were made from the top of the employment lists: Mr. Delaney testified (JA 27):

> "When we come to employ an attorney in the excepted service, we can pick our new employee from any part of the employment list of new applicants. I believe we can go further than that, and pick an attorney up off the street, for that matter, as far as the law is concerned. * * *"

(The basis for Mr. Delaney's views as to the law is discussed under heading IV which follows.)

As to other violations of plaintiff's reemployment rights, note also the proviso of Section 8 prohibiting the passing over of a veteran in favor of a nonveteran.

Plaintiff also made application to the Civil Service Commission for reemployment. JA 16, 38, 111-112. The Civil Service Commission denied plaintiff any reemployment rights whatever, stating: "An employee in an excepted position reached for layoff and separated, has no job reassignment rights." JA 126-127. Such refusal by the Civil Service

Commission of any reemployment assistance whatever likewise constitutes a violation of Sections 15, 7, 8 and 9 of the Veterans' Preference Act. As will be shown under the next heading, the fact that plaintiff occupied an "excepted" position did not justify denying his reemployment rights under the Veterans' Preference Act.

IV.

THE DISCRIMINATIONS AGAINST THE VETERANS' PREFERENCE ACT RIGHTS OF EMPLOYEES IN "EXCEPTED" POSITIONS ARE ILLEGAL

Plaintiff's reemployment rights under Sections 15, 7, and 8 of the Veterans' Preference Act (heading III, supra) were denied solely on the ground that such rights did not extend to employees who when dismissed occupied "excepted" positions. JA 27; JA 111-112. As has been noted under heading II, supra, plaintiff's rights to retention in employment were also denied partly on the ground that "excepted" employees may be given lesser rights in reassignment competition than are given to employees in "competitive" positions. The Civil Service Commission contention that it can partly or wholly disenfranchise an employee who occupies an "excepted" position involves an important question.

Abbreviated phraseology has led to a misleading terminology which refers to "the competitive service" and to "the excepted service" as though they constituted separate branches of the Government. Such is not the case. The terminology is an ellipsis for longer and more awkward expressions to describe the special category of positions in the Civil Service which are "competitive" or "excepted", as the case may be. (Referring to the "married faculty" and the "unmarried faculty" of a university does not imply that there are two separate faculties, one of which is married, while the other is single. The word "service", like the word "faculty", is a collective noun which may designate either the aggregate or the individuals, or some of

them, which collectively make up the aggregate.) Creating a difference in appointment requirements does not create a separate "service". When a position is "excepted" from competitive appointment requirements, its organizational place in an agency and its integration with other positions is unaffected.

With some assistance from that potentially misleading terminology, the Civil Service Commission has adopted the theory that it is permissible to make various special discriminations against incumbents of positions which have been classified as "excepted", denying them the same rights, or the same measure of rights, accorded to incumbents of "competitive" positions. These disenfranchisements of incumbents of "excepted" positions are not limited to matters of new appointments (which is the sole basis for "excepting" Schedule A positions), but extend to other disqualifications, e.g., retention in employment, and reemployment rights. See also: JA 126; JA 22, 27; and Civil Service Commission regulations, Sec. 21.11(b)(6).

A. The Veterans' Preference Act Gives Equal Rights To Veterans In The So-Called "Excepted Service".

The Veterans' Preference Act begins with Section 2, which outlines the scope of the Act. Its first sentence provides that the preferences granted "preference eligibles" shall extend (a) to "the classified civil service" and (b) to "the unclassified civil service", indicating that no distinction is to be made between them.

The terms "competitive service" and "excepted service" as now used by the Civil Service Commission are substituted names for what the Veterans' Preference Act describes as the "classified civil service" and the "unclassified civil service", respectively. See Regs. Sec. 01.3(a) (1956 Cum. Supp.); Sec. 01.4(b) (1956 Cum. Supp.).

In the hearings before the Committee on the Civil Service of the United States Senate held May 19, 1944, Commissioner Arthur S. Flemming

of the United States Civil Service Commission, who had participated in drafting the bill, stated that "Section 8 is a very important and very interesting section". After reading the first two sentences of Section 8 (which were then in substantially the same form as in the present statute), he stated (page 22 of Senate Report 907, 78th Congress, 2nd Session):

> "That writes into law what has been a part of civil-service rules since 1885, but it is the first time it has been written into law.
>
> THE CHAIRMAN. In what cases does that apply now, Mr. Flemming?
>
> MR. FLEMMING. Under the normal rules and regulations of the Civil Service Commission it applies to all positions that are part of the classified or competitive civil service * * *.
>
> * * * *
>
> Going on to section 9, it simply applies provisions of this law to the unclassified service."

Thus it was the intent of Congress in the Veterans' Preference Act to write into law, for the benefit of veterans the merit system protections which then applied only to "classified" ("competitive") positions, and to have them apply equally in the case of "unclassified" ("excepted") positions. The Veterans' Preference Act contains no permission to the Civil Service Commission to make discriminations against the "excepted service" in the very rights which Congress, in that statute, created as statutory rights, for the very purpose of preventing their administrative abrogation.

B. The Basis For Discriminations Against The "Excepted Service" Is Untenable.

The authority for "excepting" positions is found in a provision contained in Section 2 of the Civil Service Act, which provides that Executive exceptions may be made from the principles of the Civil Service Act, but in that case the reasons for doing so must be stated in the Civil Service Commission's annual reports. That provision reads as follows:

> "And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the Commission".

The reasons for "excepting" Schedule A positions (including plaintiff's) are indicated in Civil Service Commission Annual Reports in describing them as

> "Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine * * *".

The exception thus appears to be limited to dispensing with requirements as to competitive examinations.

Moreover, the privilege given by Section 2 of the Civil Service Act to make exceptions is limited to the provisions of that statute. By discriminating against rights under the Veterans' Preference Act because the employee occupies a Schedule A position, a qualified permission to make exceptions to the requirements of an earlier statute has been transformed into a prerogative to defeat the power of Congress by a later statute to set up merit system rules.

The argument that the "general grant of authority" over the civil service given the President by R. S. 1753 cannot be controlled by subsequent enactments, or that the power to make exceptions under the Civil Service Act cannot be restricted by later law, was the basis of the District

Court decision in Roth v. Brownell, 117 F. Supp. 362 (1953). That argument was overruled by this Court, Roth v. Brownell, 94 U.S. App. D.C. 318, 215 F. 2d 500 (1954), cert. den., 348 U.S. 863.

V.

THE CIVIL SERVICE COMMISSION APPEAL VIOLATED PLAINTIFF'S RIGHTS TO DUE PROCESS OF LAW

In reduction in force cases, Regs. Sec. 20.9 concedes an employee an appeal to the Civil Service Commission on the issue that "the regulations in this part [Part 20] have not been correctly applied." A right of appeal granted by regulations, while it stands, has the force of law. Judge Frank, dissenting in United States ex rel Accardi v. Shaughnessy, 206 F. 2d 897, 901 (2 Cir., 1953), substantially sustained in Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954).

A. Denial Of A Hearing

The Civil Service Commission recognizes that an employee's claim that he was placed in too narrow a level is an issue appealable to them. JA 121-122; JA 103-104. That issue was explicitly raised in plaintiff's appeal to the Civil Service Commission, including plaintiff's contention that he should have been placed in the same level with Messrs. Sloan and Hubler. JA 118, 120. The issue was vital, since if plaintiff was correct his discharge was incorrect even according to the regulations. Regs. Sec. 20.5(c).

The issue was one of fact; for it involved the application of the rule of Regs. Sec. 20.2(f), defining "competitive level", to the situation existing in the agency. Regs. Sec. 20.2(f) seems to make the composition of levels depend upon questions of "interchangeability" of employees and functions. There is doubt as to the proper construction of that provision; but however the question of construction may be resolved there still

remains the ultimate problem of applying the rule to the facts; and that is a question of fact. Mr. Delaney testified, speaking of the question of levels, that it involved "a question of fact, of fact and opinion". JA 21. See also JA 104.

Plaintiff attempted to appeal to the Civil Service Commission on that issue. Mr. Dawson's affidavit states (JA 94):

> "* * * It was attempted on behalf of appellant to introduce evidence that in the past there had been wide interchangeability of attorneys in various functions of the Federal Trade Commission, and that the arrangement of competitive levels which had been used in the reduction in force did not correspond to the actual facts of the situation in the Federal Trade Commission, but that the competitive levels which had been established were much narrower and smaller than the facts would justify. Appellant's counsel was cut off from presenting such evidence. Mr. Valentine stated that the question whether the competitive levels were properly established was a matter which the Commission would decide independently, and that, if the Commission felt that it needed further evidence on that point, it would send an investigator to determine it."

Mr. Forkner's affidavit confirmed the fact that plaintiff was not permitted to present his case on that issue. JA 89-90

On an appeal to which an appellant is entitled as of right, affecting the determination of his statutory rights, on which his livelihood depends, if he is not permitted to present evidence on a vital issue he is denied due process of law. Cf. Wieman v. Updegraff, 344 U.S. 183, 192 (1952).[1]

As to the issue of the level, plaintiff's right to a hearing was clear. If there were other issues on which plaintiff was also entitled to a hearing, the same consequence follows as to them, since the hearing officers refused to listen to evidence on any aspect of the case except the single question of the relative retention standing between plaintiff and the three other attorneys who had been placed in the same level. JA 87-91; 91-95.

---

[1] If the interest of a public servant in his employment enjoys constitutional protection against legislative violation of due process, it must be similarly protected against procedural due process violation.

B. Denial Of The Right To Examine The Retention Register.

The right to examine the retention register is given by Regs. Sec. 20.4(d)(3). That right was denied. JA 13, 105. It appears to have been Mr. Delaney's contention that plaintiff was entitled to examine only the page in the register on which his name appeared. JA 105.

Examination of the entire retention register was essential to an adequate contest of the issue of the excessive narrowness of the level. The question on that issue was not what positions had been included in the field of intra-level competition, but rather what had been excluded. The retention register supplied that information, in complete and systematic form. Neither seeing a single page, nor copies of three or four pages, is allowance of the right given by Regs. Sec. 20.4(d) (3) to examine the retention register. Such examination of the register in advance of hearing corresponds to notice of charges; both are necessary to permit adequate defense: both are necessary to afford due process.

With their motion for summary judgment defendants filed an affidavit by Mr. Delaney which stated: "This is to certify that I showed Mr. Oliver W. Toll the retention register covering all excepted attorneys in the headquarters office of the Federal Trade Commission several days after he was issued his reduction in force notice." Plaintiff did not reiterate his sworn allegation in the complaint. Until Rule 56(c), F.R.C.P. is amended to require reassertion by counter-affidavit, a plaintiff is not required to engage in a swearing match. However, plaintiff did file affidavits by Mr. Buehler and Mr. Dawson, both of which tended to support plaintiff's allegation and to discredit Mr. Delaney's affidavit. JA 106, JA 93. See also R. 794, JA 23.

The rather carefully restricted description in Mr. Delaney's affidavit, — "the retention register covering all excepted attorneys in the headquarters office", — to describe a retention register which covered

all positions in the Federal Trade Commission (R789, JA 22) is puzzling. If Mr. Delaney could be so precise as to the apparently rigid limitations of an examination one would have thought he could have been more explicit as to the circumstances under which such a restricted examination was arranged. For the Court to decide the issue by sustaining that affidavit as against the evidence given by Mr. Dawson and Mr. Buehler, and in the face of the allegation in the complaint, is contrary to the provisions of Rule 56.

C. Unfair Procedures.

Plaintiff had a right that the procedure of the hearing should accord with the fundamental principles of due process.

1. He who decides must hear. The decision on plaintiff's appeal was rendered by a person not present at the hearing (JA 13, JA 36, 37), violating the fundamental principle that he who decides must hear. United States v. Morgan, 304 U.S. 1 (1938). There was no transcript or other adequate record of the hearing. JA 13, 37, 87-88, 92. We cannot know what action, if any, was taken by the officers who presided. We do not know what if anything was in the file, other than certain reports which had been prepared prior to the hearing. Without an adequate record and without a transcript it was impossible that consideration of the case by a person who did not hear it could have been adequate.

2. Inconsistency of the judge's roles. Mr. E. A. Dunton, who decided plaintiff's appeal, was the same person with whom Mr. Delaney had discussed his plans for the reduction in force (JA 28), and who, when first informed of the plans, had remarked that he had been "thrown a low curved ball". JA 108. Note also Mr. Dunton's setting of the Civil Service Commission hearing for the same day on which the District Court petition to obtain evidence bearing on the case had been set. JA 96.

3. Use of secret evidence. The persons presiding at the hearing apparently placed their principal reliance on reports from their investigators (JA 94), which plaintiff was not allowed to examine. JA 88, JA 93, JA 90-91. There was a similar withholding of evidence from plaintiff's inspection with respect to the correspondence between the Federal Trade Commission and the Civil Service Commission, in preparation for the reduction in force. JA 89. But papers are not in fact rendered privileged merely by being placed in some Government files. There must be some reason why the papers should not be seen. Dulles v. Nathan, 96 U.S. App. D.C. 190, 225 F. 2d 29 (1955). No reason was shown in the instant case. Employees' retention standing is not a legitimate subject of Governmental secrecy.

Investigators' reports are supposedly obtained for the veteran's appeal. Is not the appeal provided in order to protect the veteran? It is a queer protection which is available only to his adversaries.

Later court production of secret evidence is not an adequate substitute for a fair hearing. Is the Court now to conduct the fair hearing which the administrative agency should have given? Or is the Court to approve the administrative decision because the Court has been let in to the secret?

4. Badges of bad faith. In Civil Service Commission reduction in force cases, the disadvantages under which an employee labors in his unequal contest against defendants entrenched in the Government and defended by Government counsel at public expense are carefully preserved and magnified. The dockets are secret. The veteran cannot learn of similar cases, to make common cause with others, his only chance of equalizing the odds. The hearings are secret and a transcript is forbidden. He does not have the protection given by access of the public to proceedings, and he is hampered in preserving his record. The decisions are unpublished and unavailable. Not even the principles of decisions are published.

These concealments are unnecessary to honest government. There is a strong public policy against closed hearings. Why, over the employee's protest, must a hearing be secret? Self-serving reiterations of the careful consideration given an employee's appeal are a poor substitute for open conduct and a fair hearing.

Whether a veteran's appeal has been heard in such an open and impartial manner, and with such evidence of correctness, that a court may say that the case has already received fair and ample administrative consideration, and for that reason refuse to hear it, is a question which involves the facts as to what was done. When the veteran asserts that the hearing was unfair, to give a summary judgment against him on that question of fact is to compound one arbitrary proceeding by another.

VI

THE REDUCTION IN FORCE WAS AN EVASION OF MERIT SYSTEM PROTECTIONS.

Plaintiff's complaint has alleged that his dismissal was illegal because the reduction in force was a mere maneuver to defeat the merit system for political purposes. JA 2-3, 14-15, 51-53. Considerable confirmatory material is found in the affidavits. JA 97-100; JA 100-103; JA 106-110. The reluctance of defendants to being interrogated (JA 61-62), Mr. Parrish's nonappearance in response to subpoena (JA 78-79), and the sharp and irreconcilable conflict between Mr. Delaney's version of the reduction in force (JA 29-30) and Mr. Horton's testimony (JA 80-82) are also confirmatory.

It cannot be said, as a matter of law, that official fraud is immune from attack. It is true that an attack on official good faith is seldom sustained. But that result is due to a variety of special grounds, such as: the official's immunity from personal liability; plaintiff's failure to exhaust administrative remedies; insufficient evidence to sustain the charge

upon trial; complainant limited to direct appeal; complainant without standing to sue; injury to complainant too speculative; res judicata; subject matter legitimately privileged; sovereign's immunity from suit; or statutory declaration of administrative finality. None of the foregoing grounds apply to the instant case. Where fraud in a matter of Government personnel is established the injured employee is entitled to judicial relief. Knotts v. United States, 128 Ct. Cl. 489, 121 F. Supp. 630 (1954).

The absence of any admissible evidence contradicting plaintiff's allegations and evidence that the reduction in force proceedings were a mere evasion of merit system rights is pointed out infra in this Brief under heading VIII.

VII

OTHER MATTERS

1. Defendants' affirmative defenses.

a. The claim that judicial consideration is barred. The basis for plaintiff's action lies in the inherent powers of the courts. Prior administrative proceedings are immaterial unless they have afforded an adequate consideration of a plaintiff's claim. The regulation allowing a Civil Service Commission appeal in reduction in force cases by its terms appears to exclude any attack on the Commission's regulations, and to restrict the appeal to the narrow question whether the regulations have been properly applied. Regs. Sec. 20.9(a). But in the instant case even on matters within the scope of the appeal there was no adequate consideration. Cf. heading V, supra.

b. The claim of laches. There is no basis for that claim. If there has been economic loss, the defendants are the cause. JA 117. They have not been misled. Plaintiff has been diligent. JA 117.

2. The judgment as to Mr. Carretta. Mr. Carretta was joined in

the complaint as a defendant although his term as Commissioner had already expired. JA 4. The District Judge held: "* * * it appearing to the Court that Albert A. Carretta is not a proper party defendant, it is * * * ORDERED, That the complaint, insofar as it relates to Albert A. Carretta, be and it is hereby dismissed." JA 1-8. But Rule 21, F.R.C.P., states: "Misjoinder of parties is not ground for dismissal of an action. * * *". There was no separate claim against Mr. Carretta. The judgment was with prejudice. Rule 41(b), last sentence. Plaintiff asks that the judgment be corrected to be a dismissal of Mr. Carretta as a party defendant.

3. Curtailment of plaintiff's case. Plaintiff's motion for continuance of the hearing on defendants' motion for summary judgment, and to compel Robert M. Parrish to appear for the taking of his deposition, and to require defendants to answer interrogatories (JA 77-79) was denied by the District Court. JA 86-87. This was error, because it forced plaintiff into a hearing on the motion for summary judgment without a fair opportunity to make the best showing he could as to his claims, since they turned to some extent upon facts within the exclusive control of the defendants. It is contrary to the spirit of Rule 56 to permit a motion for summary judgment to be used to force a plaintiff out of court without a fair opportunity to present his case. Cf. Rule 56(e), F.R.C.P. A solution was presented in plaintiff's request incorporated in plaintiff's opposition to the motion for summary judgment, for hearing and conference before the Commissioner for Veterans' Cases. JA 60. Cf. Rule 29 of the District Court, which is set forth in the Supplement to this Brief. The granting of summary judgment implied the denial of that request.

4. Plaintiff was entitled to amend his complaint. Defendants had mailed their answer on the day prior to plaintiff's attempt to amend, but it had been mailed to the wrong address, hence did not constitute service. District Court Rule 5(a). JA 55-56. Plaintiff was entitled to amend

his complaint as of course prior to service of the answer. Rule 15 (a), F.R.C.P.

VIII

IN THE LIGHT OF THE MATERIAL BEFORE THE DISTRICT COURT SUMMARY JUDGMENT FOR DEFENDANTS WAS ERRONEOUS.

A. Unsworn Material Should Not Be Admitted Under Rule 44 As A Basis For Deciding A Motion For Summary Judgment.

In support of their motion for summary judgment defendants submitted certificates by officials of the Federal Trade Commission (JA 44) and the Civil Service Commission (JA 40) certifying attached photostats. These were submitted by defendants as evidence of the truth of the matters stated in the attached copies. Thus, a copy of a memorandum by Mr. Edward F. Howrey, entitled "Notice to staff, Re: Extent of Reduction in Force" (JA 41-43), which quoted a memorandum said to have been received from an unnamed "budget officer", was apparently submitted as refuting plaintiff's claims as to the political character of the reduction in force. Plaintiff's opposition to the motion for summary judgment stated: "Defendants' unsworn exhibits are not entitled to consideration upon the hearing of the motion." JA 60. The colloquy at the hearing appears in JA 132-134. Plaintiff's counsel objected to the papers as unsworn. JA 132. Defendant's counsel referred to "the provisions of the Rules of Civil Procedure 44, which allows proof of official record to be made by the person having the custody of these records." Then followed (JA 133):

> THE COURT: How does Rule 44 read? (The rule was handed up). This is a certificate, not an affidavit.
>
> MR. RYAN: I think it provides for a certificate by a custodian, Your Honor.
>
> THE COURT: Let us see whether it does. It provides for a certificate; that is all that is required.

After a further objection by plaintiff's counsel, the Court stated: "Very well. I will consider the record as appropriate in the consideration of the motion." The Court thus tested the sufficiency of the tendered evidence according to the provisions of Rule 44 rather than those of Rule 56.

Consideration of this material was erroneous for the reasons stated in counsel's objections during the colloquy. JA 132-134. Moreover, Rule 44 relates to identification of papers; it does not purport to give their contents the quality of an affidavit.

In Goldman v. Summerfield, 94 US App DC 209, 214 F. 2d 858, 859 (1954), the Government, without submitting affidavits, attached a collection of exhibits to its legal memorandum. This Court held that the exhibits were not entitled to consideration on the motion for summary judgment, pointing out various defects in their evidential quality. One of those defects, — that there was nothing to vouch for the papers' "authenticity and completeness", may perhaps be satisfied in some degree in the instant case by the certificates. But the principal objection remains, that "statements of fact in such memoranda cannot ordinarily be given the dignity of a pleading or deposition * * *." It would be a dangerous and absurd practice if the Government were to be permitted, by filing a memorandum and certifying a copy of it, to establish its contents as the equivalent of sworn statements. In the instant case Mr. Howrey's memorandum has the further defect that, practically in its entirety, it is hearsay. JA 41-43. Cf. Rule 56(e), F.R.C.P.

B. Summary Judgment Is Improper Unless It Is Clear That Plaintiff Could Not Possibly Establish A Case.

It would be anomalous if there were two standards to determine whether a plaintiff is entitled to go to trial, — one if the question is raised under Rule 12(b)(6) or (c), and a different one if under Rule 56(c). A

plaintiff should not be denied his day in court under Rule 56(c) by a standard less liberal than if the issue were raised under Rule 12. If the issue is raised under Rule 12, a plaintiff is not to be deprived of his right to go to trial "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of his claim." Mullen v. FitzSimmons & Connell Dredge and Dock Co., 172 F. 2d 601, 602 (7 Cir., 1948), cert den 337 US 954; 2 Moore's Federal Practice (2nd ed.) par. 1208, and cases cited.

In substance the test under Rule 56 should be the same; and it would appear that such, in effect, is the interpretation supplied by the cases. Cf.: Cellini v. Moss, U.S. App. D.C. 232 F. 2d 371 (1956); Cf.: Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 743-744 (1945); Farrall v. District of Columbia Amateur Athletic Union, 80 U.S. App. D.C. 396, 153 F. 2d 647 (1946); Whitaker v. Coleman, 115 F. 2d 305 (5 Cir., 1940); Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 865 (5 Cir., 1951), cert den 341 US 934, reh den 341 US 956; Colby v. Klune, 178 F.2d 872, 873-5 (2 Cir., 1949); Jan Products Co. v. Mills Bros., 9 F.R.D. 26 (D.C.N.Y., 1949); Garrett Biblical Institute v. American University, 82 U.S.App. D.C. 265, 163 F.2d 265, 267 (1947).

From the material before the District Court it did not appear to a certainty that plaintiff could be entitled to no relief under any state of facts which could be proved in support of his claims. It was therefore error for the District Court to grant summary judgment in favor of the defendants.

Plaintiff's various claims had been substantiated at the time of the hearing in varying degrees. As to plaintiff's claim of right to retention in employment in the position of either Mr. Sloan or Mr. Hubler, plaintiff believes that all elements necessary to support a judgment for plaintiff are now in the record.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed and the case remanded with direction to enter judgment in favor of plaintiff in accordance with the prayer of the complaint, together with such other relief as may be appropriate.

Respectfully submitted,

OLIVER W. TOLL

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Appellant Pro Se

SUPPLEMENT

CONSTITUTION

FIFTH AMENDMENT

* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

STATUTES

CIVIL SERVICE ACT, Act of January 16, 1883, c. 27, 22 Stat. 403 (5 U.S.C.A. 632, et seq.):

* * * *

SEC. 2. * * *

Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. * * *

Second, that all the offices, places and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

* * * *

Fifth, no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

* * * *

Sixth, no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

* * * *

Eighth. * * * And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the Commission. * * * [5 U.S.C.A., Sec. 633(2)]

* * * *

SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes * * *. [5 U.S.C.A., Sec. 638]

CIVIL SERVICE RETIREMENT ACT, Act of May 22, 1920, c. 195, 41 Stat. 614 (5 U.S.C.A. Sec. 691):

Section 1. * * *

All employees in the classified civil service of the United States who have on August 20, 1920, * * * [etc.] * * * shall be eligible for retirement on an annuity * * *[etc.] * * *.

ACT OF MARCH 27, 1922, c. 116, 42 Stat. 4701 (5 U.S.C.A. Sec. 679):

That in the administration of the Civil Service Retirement Act the expression "all employees in the classified civil service of the United States", as used in section 1 thereof, shall be construed to include all persons who have been or may hereafter be given a competitive status in the classified civil service, with or without competitive examination, by legislative enactment, or under the civil service rules promulgated

by the President, or by Executive orders covering groups of employees with their positions into the competitive classified service or authorizing the appointment of individuals to positions within such service.

The expression "classified civil service", as the same occurs in other acts of Congress, shall receive a like construction to that herein given.

VETERANS' PREFERENCE ACT OF 1944, Act of June 27, 1944, 58 Stat. 387; 5 U.S.C.A. (Cum. Supp.) Sec. 851, et seq.:

* * * That this act may be cited as the "Veterans' Preference Act of 1944."

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; * * * preference shall be given to * * * (4) those exservicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions * * * [5 U.S.C.A. (Cum. Supp.) Sec. 851]

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2(1), (2), (3), and (5), and five points shall be added to the earned ratings of those persons included under section 2 (4) and (6) * * *[1/] [5 U.S.C.A. (Cum. Supp.) Sec. 852]

* * * *

1/ Act of August 14, 1953, c. 485, Sec. 1(2), 67 Stat. 581, inserted: "who have received a passing grade".

SEC. 7. The names of preference eligibles [2/] shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating * * * [5 U.S.C.A. (cum. supp.) Sec. 856]

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: Provided, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing * * * [5 U.S.C.A. (Cum. Supp.) Sec. 857]

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this act. [5 U.S.C.A. (Cum. Supp) Sec. 858]

* * * *

2/ Act of August 14, 1953, C. 485, Sec. 1(b), 67 Stat. 581, inserted: "who have received a passing grade".

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this act. [5 U.S.C.A. (Cum. Supp.) Sec. 860]

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided further, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. June 27, 1944, c. 287, Sec. 12, 58 Stat. 390, amended 1949 Reorg. Plan No. 5, eff. Aug. 19, 1949, 14 F.R. 5227, 63 Stat. 1067 [5 U.S.C.A. (cum. Supp.) Sec. 861].

* * * *

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except

for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends * * *.

* * * *

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and

reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled. [5 U.S.C.A., (Cum. Supp.) Sec. 864]

* * * *

SEC. 18. All acts and parts of acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof. [5 U.S.C.A. (Cum. Supp.) Sec. 867]

SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this act and such Executive orders as may be issued pursuant thereto and in furtherance thereof; Provided, That any recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible, employee or former employee, shall be complied with by such agency. [5 U.S.C.A., (Cum. Supp). Sec. 868]

* * * *

SEC. 21. If any part of this act shall be found to be unconstitutional, the rest of it shall be considered as in full force and effect.

* * * *

CODE OF FEDERAL REGULATIONS

Title 5 - Part 20 - Retention Preference Regulations for Use in Reduction in Force

[As revised December 25, 1952, and as amended to October, 1953]

Sec. 20.1 Extent of part. The regulations in this part establish degrees of retention preference and uniform rules for reductions in force. They apply to all civilian employees in the executive branch of the Federal Government, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate, and those who are appointed by the President of the United States. (Sec. 20, 58 Stat. 391; 5 U.S.C. 869.)

Sec. 20.2 Definitions. For the purposes of the regulations in this part definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation of an employee from a duty and pay status for more than 30 days, by furlough or by separation from the rolls, in order to reduce personnel. The term does not apply to termination of temporary appointments, retirement of employees, or separations for cause and other actions proposed for reasons which promote the efficiency of the service.

(b) "Furlough" * * *

(c) "Competing employees" for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position.

(d) "Qualified" for a position means having the basic education and experience, and such special skills and aptitudes as are necessary, to take over the position in a reduction in force and render satisfactory service without undue interruption to the work program.

(e) "Competitive area" means that part of an agency, usually within a local commuting area, in which employees are shifted, transferred, reassigned, promoted, and demoted under single administrative

authority, and within which competitive levels are established in reductions in force. (It does not establish a limitation for placement during reduction in force.)

(f) "Competitive level" means all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Generally such positions will be in the same grade or occupational level, but this is not necessary if the other tests are met.)

(g) "Retention standing" means precise rank among competing employees for a continuing position, by retention group and subgroup, and by retention credits within each subgroup.

(h) "Retention credits" are credits given for length of Government service and performance ratings.

(i) "Government service" means the total of all periods of civilian service in the executive, legislative, and judicial branches of the Federal Government and in the District of Columbia Government, and of all active military service.

(j) "Performance rating" * * *

(k) "Continuing position" in a reduction in force is a position which is expected to continue for at least 3 months after the effective date of the separation, furlough, or reduction in grade or salary of an employee qualified for such position.

(l) "Effective date" * * *

Sec. 20.3 Completion of employee records. * * *

Sec. 20.4 Order of selection - (a) Determination of competitive area. (1) An agency may establish a general plan of competitive areas by obtaining prior approval from the central office of the Civil Service Commission. Subsequent clearance with the Commission will not be required concerning competitive areas conforming to the approved general

plan unless there has been a material change in the agency's organizational structure or other facts on which the general plan was approved.

(2) In the absence of an approved general plan the normal competitive area shall be a bureau or equivalent part of an agency in the departmental service, or all of a field installation in a local commuting area, or any combination of these as may be determined by the agency.

(b) Determination of competitive level. Within the competitive area the agency will determine competitive levels of positions to be affected by a reduction in force.

(c) Determination of tenure groups. For the purpose of determining relative retention preference in reductions in force, competing employees with performance ratings of "Satisfactory" or better shall be classified according to tenure of employment and veteran preference in groups and subgroups as follows:

(1) Group I - Career. In the competitive service, this group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer, or reinstatement, except that career employees serving under conditional promotions shall be considered in this group with respect to positions at and below the grade in which they last served on a permanent basis. In positions excepted from the competitive service, this group includes all employees serving under appointments with no conditions or restrictions. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B."

(2) Group II - Career-Conditional. In the competitive service, this group includes career employees who are conditional because they are serving probationary periods, or are "temporary" or "indefinite" as the result of promotion, transfer, or reinstatement, or are subject to some other limitation of a similar nature. In positions excepted from the competitive service, it includes employees who are conditional solely as the result of promotion or reinstatement. Within this group,

persons entitled to veteran preference are in subgroup "A" and others in subgroup "B."

(3) Group III - Indefinite. This group includes persons serving under nonstatus non-temporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any condition or limitation other than a conditional promotion or reinstatement or a specific time limitation of 1 year or less. Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B."

(d) Retention register. - (1) Compilation. When two or more competing employees are in a competitive level which is to be affected by a reduction in force, the retention records of such employees shall be brought up to date on a current basis, and a retention register shall be compiled. All employees in positions in the particular competitive level, whether in duty, leave, or furlough status, excluding only those absent in the armed forces of the United States with reemployment rights, shall be entered on the register in the order of retention groups and subgroups, and according to retention credits in any subgroup when there are two or more. One retention credit shall be given for each full year of Federal Government service, and four retention credits shall be given for an "Outstanding" performance rating. If there are any temporary employees assigned to positions in the competitive level, their names and the expiration dates of their appointments shall be entered below the space provided for employees in retention groups on the register. Likewise, if there are any employees serving in positions in the competitive level under any kind of appointments, with current official performance ratings of "Unsatisfactory," their names shall be entered on the register below the names of temporary appointees.

(2) Separation of registers. Separate registers shall be compiled to show the distinctions between competitive levels representing positions in the competitive service; excepted from the competitive service; and those filled on a seasonal, when-actually-employed (WAE), or part-time basis.

(3) Availability for inspection. Employees notified of proposed adverse action in a reduction in force shall have an opportunity to examine retention registers and other records which have a bearing on the actions in their cases. All registers and records shall be open for inspection by representatives of the Civil Service Commission.

(e) Sequence of selection. With respect to each competitive level, action must be taken to remove all employees with official "Unsatisfactory" performance ratings, and all temporary employees, from positions affected by a reduction in force before any competing employee, in any retention group, is reached for action. Thereafter, selections for action must be made in order from the bottom to the top of the register. Half years of service will be used in breaking ties in retention standing, but any ties still remaining will be decided administratively.

Sec. 20.5 Actions - (a) In general. Employees who cannot be retained in their positions because of a reduction in force will be changed to continuing positions, separated, or furloughed.

(b) Employees in positions in the competitive service. (1) No employee may be separated, or furloughed for more than 30 days, or reduced in pay or grade in a reduction in force while a competing employee with lower retention standing is retained in the same competitive level.

(2) No employee in any subgroup of the career group or the career-conditional group who is willing to accept a reasonable change in position may be separated, furloughed for more than 30 days, or subjected to greater reduction in pay than necessary under such reasonable change in position, if he is qualified for a continuing position in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained, or if he is qualified to go back to a continuing position from which he was promoted (or to an essentially identical position) in his present competitive area in which an employee with lower retention standing is retained.

(c) Employees in positions excepted from the competitive service. No employee in a position excepted from the competitive service may be separated, furloughed for more than 30 days, or reduced in grade or pay in a reduction in force if a competing employee with lower retention standing is retained in the same competitive level.

(d) Reasonable change in position. Any change in position under these regulations is reasonable if it is made without reduction in grade or pay. If a reduction in grade or pay cannot be avoided, any such change is reasonable if made with the least reduction required to conform with these regulations. Employees are not required to be given options as to alternative changes possible in any particular case. No agency shall be required to fill a vacant position, or to promote any employee, or to transfer any employee to a different duty station, and no agency shall be prohibited from taking such administrative actions. No employee rendering satisfactory service in a position shall be required to be displaced by a competing employee who is not qualified for such position under the regulations in this part.

(e) Furloughs. * * *

(f) Exceptions. * * *

Sec. 20.6 Notice to employees - (a) Proposed action. Each employee who is to be separated from the rolls, furloughed for more than 30 days, or reduced in grade or pay, in a reduction in force, under the regulations in this part, shall be given a notice in writing, stating specifically the action proposed in his case and the reasons therefor, at least 30 days, and not more than 90 days, except as provided in paragraph (e) of this section, in advance of the effective date of the action.

(b) Status during notice period. * * *

(c) General and special notices. * * *

(d) Contents of notice. * * *

(e) Employee with statutory retention rights. * * *

(f) Invalidation of notices. * * *

Sec. 20.7 Reemployment priority - (a) Reemployment priority list. Each agency shall establish and maintain a reemployment priority list for each commuting area from which career employees (and career-conditional employees, who have completed probation) have been separated in reductions in force, from competitive service positions on the basis of notices as provided in section 20.6. Each of these employees shall have his name entered on the reemployment priority list for all competitive service positions in the commuting area for which he is qualified and is available, and continued on such list for a period of 1 year from the date of such notice. His name may be deleted from such list upon his signed written request, upon his acceptance of a nontemporary position in any Federal agency, or if he declines reemployment to a position in the competitive service equivalent in grade and salary to the position from which separated by reduction in force.

(b) Restriction in filling positions. No position in the competitive service, for which there is a qualified person available on the reemployment priority list, may be filled by the transfer of an employee of a different agency, or by the new appointment of any person except a qualified 10-point preference eligible. Furthermore, no such position may be filled by the reemployment of a person who is not on the reemployment priority list, unless such person is a preference eligible. These restrictions shall not apply if all qualified persons on the reemployment priority list decline, or fail to respond to, offers of reemployment to the position. In selections for reemployment from such priority lists, qualified preference eligibles shall have preference. An exception to these provisions may be made only when necessary to obtain an employee for necessary duties which cannot be taken over without undue interruption to the activity, by any person on the reemployment priority list, or with greater preference on such list.

In such cases, each person adversely affected by the exception must be notified of the reasons, and of his right to appeal to the Civil Service Commission for a review of such reasons.

(c) Reemployments. Any person listed, or entitled to be listed, on a reemployment priority list may be reemployed in the competitive service under this section within his period of reemployment priority, and when so reemployed shall have the same tenure as if he had been transferred from his last career appointment.

(d) Appeals. Any former employee who feels that there has been a violation of his reemployment priority benefits under the foregoing provisions may appeal to the Civil Service Commission by presenting factual information that he was improperly denied reemployment as the result of the employment of another person.

Sec. 20.8 Special regulations relating to consolidation and liquidations. * * *

Sec. 20.9 Appeals. (a) Any employee notified of proposed action in a reduction in force who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Civil Service Commission, stating reasons for believing the proposed action to be improper, within 10 days from the date he received notice of the proposed action (or supplementary notice specifying different adverse action), or within 10 days after a decision by the agency on his answer to any notice giving him an opportunity to answer.

(b) Further appeals: An appeal may be made by the employee or the employing agency from the initial decision within the Commission, to the Commissioners, United States Civil Service Commission, Washington 25, D.C., within 7 days of the date of receipt of notification of the initial decision.

(c) Finality of Commission recommendation: The agency is required to take corrective action without delay conforming to the

Commission's recommendation, but action to comply with an initial decision may be stayed when a further appeal to the Commissioners is made in accordance with paragraph (b) of this section, until such time as the Commission's decision on the further appeal is made. (62 Stat. 575; 5 U.S.C. Sup. II 868.)

COURT RULES

RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Rule 29. Veteran's Cases, Etc.

(a) REFERENCE TO COMMISSIONER. The following cases when filed shall stand referred to the Commissioner of Veterans' cases:

1. Actions against the United States on contracts of War Risk or other life insurance.
2. Actions against an officer of the United States for mandatory or injunctive relief concerning insurance, compensation, retired emergency officers' pay, or other benefits due veterans or their dependents.
3. Actions by the United States for moneys erroneously paid veterans, their dependents or beneficiaries, or for the escheat of moneys awarded to any such persons.

(b) REFERENCE BY PRE-TRIAL JUDGE. Actions between private parties directly involving rights, privileges or immunities extended by Congress for the protection, rehabilitation, or readjustment of veterans, including re-employment suits by veterans against their former employers, may be referred to the Commissioner by the pre-trial judge.

(c) DUTIES OF COMMISSIONER. He shall endeavor, by conference with the attorneys, to simplify the issues, settle the pleadings by any proper amendments, obtain admission of facts and documents, regulate the time for taking depositions, limit the number of expert witnesses, and otherwise promote a final disposition of the case.

(d) REPORT OF COMMISSIONERS. He shall report to the court the results of the reference, specifying any issues of fact to be tried, or if an issue of law is raised, giving his opinion and the authorities bearing thereon.

(e) POWERS OF COMMISSIONER: SUMMARY OF EVIDENCE: ADVICE AS TO TIME FOR TRIAL. He may require attendance of attorneys and production of all official record evidence intended to be offered by the parties. If they consent he shall summarize the same for use at the trial. He shall advise the Assignment Commissioner of a suitable time for trial.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 18 1957

Joseph W. Stewart
CLERK

No. 13472

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

OLIVER W. TOLL, APPELLANT

v.

JOHN W. GWYNNE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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OLIVER GASCH,
United States Attorney,
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No. 13,472

QUESTION PRESENTED

In the opinion of appellees, the question presented is:

Whether the Civil Service Commission correctly held that appellant's rights under the Veterans' Preference Act were not violated by his separation, because of a reduction in force, from an attorney position in the Federal Trade Commission.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13472

OLIVER W. TOLL, APPELLANT

v.

JOHN W. GWYNNE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

COUNTERSTATEMENT OF THE CASE

This appeal arises out of an action brought by appellant Toll against appellees—the members of the Federal Trade Commission and the Civil Service Commission. The chief purpose of the action was to compel appellees to restore appellant to an "attorney-advisor" position in the Federal Trade Commission, from which he was separated in a reduction in force in alleged violation of his rights under the Veterans' Preference Act of 1944. The United States District Court for the District of Columbia granted appellees' motion for summary judgment. This appeal followed.

A. Toll's separation because of reduction in force

In September 1953, appropriation cuts required a reduction in force in the FTC staff "in order that the Commission [might] operate within its appropriated funds during fiscal year 1954" (J. A. 41–43, 44). Mr. Toll was one of those reached in this reduction "due to severe budget curtailment"

and received a notice of separation on September 8, 1953 (J. A. 44–46).

Mr. Toll is a veterans' preference eligible, having been honorably discharged from the Navy after serving from January 3, 1918 to March 19, 1919 (J. A. 4, 35). Starting in 1934, he served intermittently in various legal capacities in different federal agencies (J. A. 4–5, 35). Because of this service, he "acquired a competitive Civil Service status under the provisions of the Ramspeck Act [54 Stat. 1211, 5 U. S. C. 631a, 631b] and Executive Order 8743 [6 F. R. 2117], effective November 19, 1942" (J. A. 126).

In 1947, however, attorneys' positions were "excepted" from the competitive service by Executive Order 9830 (12 F. R. 1259). Moreover, 3 years later, Executive Order 10180 (15 F. R. 7745), in implementing the Whitten Amendment (64 Stat. 1066), provided in general that after September 1, 1950, "re-employment of former Federal employees shall be on a non-permanent basis." Pursuant to these two orders, Mr. Toll, after another break in federal service from January 27, 1949 to June 11, 1951, was given an "excepted" and "indefinite" appointment at attorney-advisor, GS–11, in the Federal Trade Commission (J. A. 5, 35, 40). He served from June 11, 1951 "without competitive status in [this "excepted"] position and with indefinite tenure" [1] until his separation on September 8, 1953 (J. A. 40, 44).

The separation notice received by Mr. Toll on that date pointed out that his "selection for separation has been made in accordance with Civil Service regulations governing reduction-in-force" (J. A. 45). These Civil Service Commission "Retention Preference Regulations for Use in Reduction in Force" [2] provide, in determining the order of separation, that employees shall be divided into groups I, II, and III, according to tenure of employment. 5 C. F. R. 20.4 (c); Toll Brief, S–10. Group

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[1] See "letter to plaintiff from E. A. Dunton, Chief Appeals Examining Officer, Civil Service Commission, dated April 9, 1954," referred to at J. A. 43 and reprinted in its entirety at p. 17 of this Brief.

[2] The Regulations now in effect appear as Part 20 of the Civil Service Commission's Regulations in 5 C. F. R., Cum. Supp. (1956). They are substantially the same as those which were in effect at the time of Mr. Toll's separation and which are reprinted in his Brief at pages S–8 to S–16.

I has the highest retention priority and is the group last reached in separations necessitated by a reduction in force. In group I are career employees in the competitive service and also employees serving in attorney or other "excepted" positions "under appointments with no conditions or restrictions" (*id.*). Group II, which has the second highest priority, is composed of career-conditional employees in the competitive service (*id.*). It also includes "excepted" employees "who are conditional solely as the result of promotion or reinstatement" (*id.*). Group III has the lowest priority and is composed of employees

> * * * serving under nonstatus non-temporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any condition or limitation other than a conditional promotion or reinstatement or a specific time limitation of 1 year or less. [*Id.*]

Within each of these three tenure groups, employees are further divided into subgroups according to veterans' preference (*id.*). Thus, in subgroups I–A, II–A, and III–A are employees with veterans' preference; in subgroups I–B, II–B, and III–B are those without veterans' preference (*id.*).

As already noted, Mr. Toll's appointment was both "indefinite" and "excepted" and he was a veteran. He was therefore placed in subgroup III–A on the Grade GS–11 retention register (J. A. 44, 125, 126). Three other attorneys were on the register in the same grade or competitive level, *i. e.*, GS–11 (J. A. 125). These three attorneys were not serving under "an indefinite appointment" (J. A. 125). They had greater tenure than Mr. Toll and were in subgroup I–A (J. A. 125). Mr. Toll therefore had the "lowest retention rights of the four employees involved" (J. A. 125). His name, accordingly, "was properly reachable [in the] reduction in force" (J. A. 43; see below at p. 18).

Mr. Toll appealed his separation to the Civil Service Commission on September 16, 1953 (J. A. 10). His appeal raised two main points: (1) The allegedly excessive narrowness of the competitive level and (2) his alleged right to be reassigned to a GS–9 position held by two other III–A employees named

Sloan and Hubler, both of whom had fewer "retention credits".[3] (J. A. 7, 118–120, 122).

On April 9, 1954, the Chief, Appeals Examining Office, Civil Service Commission, notified Mr. Toll that "A review failed to disclose any irregularities under the Retention Preference Regulations"; that "the competitive area and the competitive level were in accord with the regulations; that the retention register was properly set up; that your name was reached in order; and that you received a valid [separation] notice" (J. A. 43).[4] In affirming this decision, the Board of Appeals and Review of the Civil Service Commission later advised Mr. Toll that he "was the only GS–11 attorney in the Headquarters office of the Federal Trade Commission in retention group III" and accordingly would have been "the first employee to be affected by a reduction in force of GS–11 attorneys,"[5] even if the competitive level, which Mr. Toll alleged to be too narrow, had been broadened to include all GS–11's. This fact is further confirmed by an affidavit of the Personnel Director of the Federal Trade Commission. It states that "if all grade GS–11 attorneys throughout the Federal Trade Commission had been placed in the same competitive level, Mr. Oliver W. Toll would have been reached for reduction-in-force with the abolition of one position" (J. A. 47).

The Board of Appeals and Review also rejected Mr. Toll's additional contention that he should have been allowed to bump either Sloan or Hubler out of their GS–9 positions. The Board ruled that even if Mr. Toll had otherwise "been eligible for reassignment [or bumping rights] under the [Veterans'] Retention Preference Regulations, [he] could not have displaced either Mr. Sloan or Mr. Hubler, since they both were in retention subgroup III–A, which is the retention subgroup in which [Mr. Toll's] name appeared in [his] competitive

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[3] Mr. Toll alleges that he had 16 "retention credits (by virtue of years of Government service)," while Sloan and Hubler had 14 and 7, respectively (J. A. 7, 120).

[4] The text of this letter, referred to at J. A. 43, is reprinted in full at p. 17 of this Brief.

[5] See "Letter to plaintiff from John E. Blann, Chairman, Board of Appeals and Review, Civil Service Commission, dated November 2, 1954," referred to at J. A. 43 and reprinted in full at p. 21 of this Brief.

level. The Regulations do not permit reassignments to positions [in lower competitive levels] occupied by employees in the same subgroup as that occupied by the employee being reassigned." *

B. Proceedings in the court below

Mr. Toll then filed the present action in the court below on January 26, 1955 (J. A. 1; see Toll Brief, p. 7). His complaint set forth the same two contentions earlier rejected by the Civil Service Commission. In addition, the complaint asserted violations of (1) his re-employment rights under the Veterans' Preference Act and of (2) his procedural rights during the appeal to the Civil Service Commission (J. A. 2, 3, 12, 16). Appellees filed an answer, which in substance denied any violation of Mr. Toll's rights (J. A. 34–39). Appellees also filed a motion for summary judgment, supported by affidavits and the pertinent records of the Federal Trade and Civil Service Commissions (J. A. 39–47). The Commissioner of Veterans' Cases recommended denial of the motion (J. A. 73). However, on May 4, 1956, the district court entered an order granting the motion for summary judgment and dismissing the complaint (J. A. 135).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Veterans' Preference Act of 1944, 58 Stat. 290, as amended, and of the "Retention Preference Regulations for Use in Reduction in Force" in effect at the time of Mr. Toll's separation appear in the supplement to his brief at pages S–5 to S–16.

SUMMARY OF ARGUMENT

Mr. Toll's principal contention is that the reduction in force which resulted in his separation from the Federal Trade Com-

* See preceding footnote and pp. 21–22 of this Brief. It must be noted, on the other hand, that, under the same Regulations, an employee in the same subgroup but with fewer retention credits may be bumped by another employee with higher retention credits if the latter has been promoted from the lower-paying position. Section 20.5 (b) (2). These "retreat" rights are not involved in the present case. Mr. Toll came into the FTC with an initial appointment to a GS–11 position (J. A. 5). He therefore has no "retreat" rights to the GS–9 positions held by Sloan and Hubler.

mission violated his rights under Section 12 of the Veterans' Preference Act. In Point I we demonstrate that this contention misconceives the scope of the protection afforded by Section 12 and, for that reason, is completely lacking in merit. Equally unsound, as we show in Point II, are Mr. Toll's remaining arguments, including the alleged violation of his reemployment and procedural rights.

ARGUMENT

I

Section 12 of the Veterans' Preference Act was not violated by Mr. Toll's separation

As a basis for upsetting the Civil Service Commission ruling that his separation conformed to the requirements of Section 12, Mr. Toll suggests two alternative grounds. The first ground, based on Section 12, is that his separation from a GS–11 position did not preclude him from competing against two GS–9's for job retention. His second argument, derived from the Civil Service Commission's regulations which permit the bumping of non-competing employees, is that he was improperly denied the right to bump one of the GS–9's. For the reasons set forth below, we submit that both arguments must be rejected.

A. Section 12 confers no statutory right to displace non-competing employees

Section 12 of the Veterans' Preference Act of 1944 provides that in a reduction in force "*competing* employees shall be released in accord with Civil Service Regulations," which, in turn, must give due effect to "tenure of employment, military preference, length of service, and efficiency ratings." [Emphasis supplied.]

This explicit statutory reference to *competing* employees and the decision of the Supreme Court in *Elder* v. *Brannan*, 341 U. S. 277, reiterate the established principle that a veteran's preference in job retention operates only within his *competing* group. Accord: *Fass* v. *Gray*, 91 U. S. App. D. C. 28, 197 F. 2d 587, certiorari denied, 344 U. S. 839. Indeed, as the rationale

in *Elder* makes clear, this was as true before the Veterans' Preference Act as it is today. 341 U. S. 277, 284. Prior, consistent, administrative practice had earlier established the need and propriety of confining preference to *competing* groups. See, *e. g.*, 34 Op. A. G. 159, 161 (1924); Executive Order 4240 (1925); Executive Order 5068 (1929); Executive Order 8705 (1942); 6 C. F. R. 1313.

There can be no room for doubt that this principle was correctly applied to the separation involved here. Mr. Toll was placed on a—

> retention register [which the Civil Service Commission] found after careful checking to include the names of all the incumbents of positions of the same grade—GS–11; in the same service—excepted; in the same position classification series—Attorney Advisor; in the departmental service in Washington; and whose official duties as set forth on classification sheets of record were sufficiently alike as to making incumbents interchangeable.

(See Dunton letter, April 9, 1954, at p. 18.) By taking into account relative tenure of employment, military preference, length of service, and efficiency ratings of these GS–11's within the Federal Trade Commission, as directed by Section 12, it was necessary to place Mr. Toll's "name on the bottom of the register. [His] name was, therefore, properly reachable upon the determination of the [FTC] that it would effect a separation of one or more employees from [his] competitive level [*i. e.*, GS–11] by reduction in force procedure" (*id.* at p. 18).

Mr. Toll does not challenge the rulings of both the Federal Trade and Civil Service Commissions that he had a lower retention standing than any of the other GS–11's on the same retention register. Equally important, in light of Mr. Toll's charge that too few attorneys were placed in his competitive level, is the fact that he does not controvert the sworn record statement of the Federal Trade Commission's Director of Personnel. This statement certifies "that if *all* Grade GS–11 attorneys throughout the Federal Trade Commission had been placed in the same competitive level, Mr. Oliver W. Toll would have been reached for reduction-in-force with the abolition of

one position" (J. A. 46–47). In other words, as observed by the Civil Service Commission in rejecting Mr. Toll's appeal, "the competitive levels therefore had no bearing on your separation since you would have been the first employee separated had all GS–11 attorneys in the headquarters office been included on one retention register" (Blann letter, September 30, 1954, at p. 20).

Mr. Toll seeks to escape the impact of the principle that his right to retention must be measured only against those in his GS–11 competitive level by contending that he had greater retention credits than two other attorneys, Sloan and Hubler. But the record conclusively demonstrates that "although [Mr. Toll] occupied a position with the grade GS–11 * * * said Sloan and Hubler occupied lower positions with the grade GS–9" (J. A. 7, 36). Sloan and Hubler, therefore, as noted by the Civil Service Commission, were obviously "not competing employees under the terms of the Retention Preference Regulations inasmuch as they were serving as Attorney-Adviser GS–9." See Blann letter, November 2, 1954, p. 21.

There can be no serious question raised as to the propriety of using different grade levels as a standard for measuring the extent of "competitive levels". And here, as already noted, Mr. Toll was in a grade level different from that of Sloan and Hubler. Moreover, the Civil Service Commission's ruling that the agency correctly defined "competitive level" to include GS–11's but to exclude GS–9's—like Sloan and Hubler—is, we submit, conclusive here. As recently noted by this Court in passing on a similar veteran's preference question in *Wagner* v. *Higley*, 235 F. 2d 518, 519 (C. A. D. C.), certiorari denied, 25 U. S. Law Week 3168, Dec. 4, 1956:

> * * * The district court [by granting the Government's motion for summary judgment] accepted the administrative view. Our review of questions of this kind is necessarily limited, and we find in the record no basis for disturbing the determination made by the agency and the trial court.

See also *Cutting* v. *Higley*, 235 F. 2d 515 (C. A. D. C.), certiorari denied, 352 U. S. 883; *Powell* v. *Brannan*, 91 U. S. App. D. C. 16, 196 F. 2d 871.

Such judicial non-intervention in the field of personnel administration is, of course, not a novel doctrine. It dates back to the founding of the Republic. *Eberlein* v. *United States*, 257 U. S. 82; *Burnap* v. *United States*, 252 U. S. 512; *Brown* v. *Lane*, 232 U. S. 598; *Reagan* v. *United States*, 182 U. S. 419; *Keim* v. *United States*, 177 U. S. 290; *White* v. *Berry*, 171 U. S. 366; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Matter of Hennen*, 13 Pet. 230; *United States* v. *Guthrie*, 17 How. 284.[7] In each of these cited cases the courts have consistently refused to substitute their own judgment for that of the administrative agency on personnel matters. Appellant's contention here that this Court should (1) supplant the agency view that GS–9's are in a different competitive level than GS–11's and (2) substitute its own court-written standards for defining "competitive level," flies in the face of all of the cited cases.

In short, Mr. Toll's rights to retention in employment under Section 12 may be exercised only as against "competing employees." When Mr. Toll's retention credits were considered along with those of all other "competing employees" in his

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[7] See also *Carter* v. *Forrestal*, 85 U. S. App. D. C. 53, 175 F. 2d 364, certiorari denied, 338 U. S. 832; *Levy* v. *Woods*, 171 F. 2d 145 (C. A. D. C.); *Friedman* v. *Schwellenbach*, 81 U. S. App. D. C. 365, 159 F. 2d 22, certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; *Siskind*, v. *Morgenthau*, 80 U. S. App. D. C. 249, 152 F. 2d 286; *Maghan* v. *Board of Commissioners of the District of Columbia*, 78 U. S. App. D. C. 370, 141 F. 2d 274; *Hammond* v. *Hull*, 76 U. S. App. D. C. 301, 131 F. 2d 23, certiorari denied, 318 U. S. 777; *Levine* v. *Farley*, 70 App. D. C. 381, 107 F. 2d 186, certiorari denied, 308 U. S. 622; *United States ex rel. Palmer* v. *Lapp*, 244 Fed. 377 (C. A. 6); *United States ex rel. Anderson* v. *Simon*, 269 Fed. 715 (C. A. D. C.); *United States ex rel. Taylor* v. *Taft*, 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Fleming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Asher* v. *Forrestal*, 71 F. Supp. 470 (D. D. C.); *Waterman* v. *Somervell*, 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *Block* v. *Sassaman*, 26 F. Supp. 105 (D. Minn.); *Gadsden* v. *United States*, 111 C. Cls. 487; *Weinstein* v. *United States*, 109 C. Cls. 579; *Culligan* v. *United States*, 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Kent* v. *United States*, 105 C. Cls 280; *Bratton* v. *United States*, 90 C. Cls. 604; *Bennett* v. *United States*, 89 C. Cls. 322; *Golding* v. *United States*, 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States*, 55 C. Cls. 174; *Lellmann* v. *United States*, 37 C. Cls. 128.

GS–11 competitive level, it was found necesary to reach him for separation. Sloan and Hubler are GS–9's and not "competing employees" with Mr. Toll. Mr. Toll, therefore, has no statutory right to displace them because Section 12 gives him no preference over non-competing employees.

B. *The Civil Service Commission's Regulations confer no right to displace non-competing employees in the same subgroup standing*

Up to this point we have shown that Section 12 of the Veterans' Preference Act guarantees a veteran the right to be preferred only over "competing employees". It gives him no statutory right to be preferred over "non-competing" employees. On the other hand, Section 12 does not preclude granting a veteran such a preference. For that reason, the Civil Service Commission's Regulations—which allow a veteran reassignment or bumping rights to a position held by a non-competing employee in a lower competitive level with a lower subgroup standing—have been repeatedly sustained as valid by this Court. See, *e. g.*, *Fass* v. *Gray*, 91 U. S. App. D. C. 28, 197 F. 2d 587, certiorari denied, 344 U. S. 839; *Powell* v. *Brannan*, 91 U. S. App. D. C. 16, 196 F. 2d 871.

It is this bumping or reassignment right—created by the regulation and permitted but not required by Section 12—which makes possible displacement of a non-competing employee holding a lower-paying job with a lower subgroup standing. This right, as already noted, is entirely different from the right conferred by the statute itself—namely, the right to be retained over competing employees in the same competitive level occupied at the time of the reduction in force.

Bumping rights in this case thus come into play only where the employee seeks to bump another employee in a lower grade level. Here, Mr. Toll, as a GS–11, sought to bump either Sloan or Hubler, both GS–9's. All three attorneys, however, were veterans and in tenure subgroup standing III–A. With the exception of certain "retreat" rights not involved here,[8] bumping regulations permit bumping only where the employee

[8] See footnote, p. 5.

to be bumped is in a "lower subgroup standing" (5 C. F. R. 20.5 (b) (2); see Toll Brief, p. S–12). Since Sloan and Hubler were in the same subgroup standing with Mr. Toll, he was not permitted to bump them. As explained by the Civil Service Commission, their "Regulations do not permit reassignments to positions occupied by employees in the same subgroup as that occupied by the employee being reassigned" (Blann letter, November 2, 1954, p. 22).

Contrary to Mr. Toll's assertion, this restriction on bumping is plainly valid.[9] At the outset, it is important to emphasize the fact that the statute itself does not require recognition of any bumping rights. In addition, the limitation imposed by the regulations on the exercise of bumping rights is not only reasonable but absolutely essential to avoid serious organizational dislocation. It must be remembered that the right to reassignment or bumping entails the right to displace an incumbent employee who himself in turn may be entitled to reassignment. This, as found by a Senate subcommittee investigating the problem, leads to "chain reactions," the "virtual restaffing of an agency" with resulting "confusion," serious disruption of agency operations, and the lowering of "unit production as much as 50 percent." S. Rep. 2102, 82d Cong., 2d sess., on "Reduction-in-Force System in the Federal Government" (July 4, 1952) at page 41.

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[9] Mr. Toll further argues that Section 20.5 of the bumping regulation is invalid because (1) it does not apply to positions in the "excepted" service and (2) it applies only to employees in groups I and II and not to those in group III. There is no need to discuss these two contentions here. The second contention, it should be noted, is directly involved in *Hoffman* v. *Brucker*, No. 13544, now pending before this Court. Moreover, even if bumping rights were to be extended to "excepted" employees in group III, it would be of no avail to Mr. Toll. As shown above, he had the same subgroup standing as Sloan and Hubler. For that reason alone he was properly denied bumping rights.

As this Court cogently observed in *Fass* v. *Gray*, 91 U. S. App. D. C. 28, 197 F. 2d 587, certiorari denied, 344 U. S. 839, such serious results may be avoided only by placing reasonable limitations on the "bumping process" which prevent it from becoming "interminably and insolubly complicated." That observation, we submit, applies with particular force to the limitation here challenged.

II

Nor is there any merit to appellant's remaining contentions

Point I deals with Mr. Toll's principal contention on appeal, *i. e.*, that he should have been retained in preference to either Sloan or Hubler. Mr. Toll also advances several subsidiary contentions. We now turn to those contentions and show that they, like the principal contention, have no merit.

A. Toll's re-employment rights were not violated

Section 15 of the Veterans' Preference Act (5 U. S. C. 864; Toll Brief, S–7) governs re-employment rights of veterans. It provides that, upon application, a veteran who has been separated without fault is to have his name placed on all registers and/or employment lists for which he qualifies. He is then to be appointed in accordance with the provisions of Sections 7 and 8, governing original appointment, provided that, where a re-employment list contains the names of three or more preference eligibles, no appointment, except of a 10-point preference eligible, "shall be made from an examination register of eligibles."

Mr. Toll's separation from an "excepted" attorney position, rather than one in the competitive or classified service, does not, as held in *Elder* v. *Brannan*, 341 U. S. 277, 289, affect the applicability of Section 15. Mr. Toll's brief, at page 29, suggests that the Civil Service Commission denied him re-employment rights under Section 15 on the ground that he was separated from an "excepted" position. However, the language quoted by Mr. Toll deals with reassignment or bumping rights,

not re-employment after separation. Moreover, there can be no doubt that Mr. Toll was accorded all the rights to which he was entitled under Section 15.

Thus, the record shows that, in conformity with Section 15, Mr. Toll's name appeared "on a [FTC] re-employment list which is given first consideration when we are thinking of employment" (J. A. 25–26). The record further establishes that Mr. Toll's separation notice explained that he would "be carried on a re-employment list" for a full year (J. A. 45). This certainly did not discriminate against Mr. Toll as an "excepted" employee. Even veterans separated from "career or career-conditional" appointments in the competitive service are entitled to have their names continued on the re-employment list only for a "period of one year from the date of such notice" of separation in a reduction in force. 5 C. F. R. 20.7; Toll Brief, S–14. Mr. Toll's re-employment rights, therefore, were in no way violated.

B. *Toll was not entitled to a Section 14 hearing*

Mr. Toll's argument that he was denied certain procedural rights in the course of his administrative appeal to the Civil Service Commission seems to be predicated on an assumption that the hearing should have conformed to the procedural safeguards imposed by Section 14 of the Veterans' Preference Act (5 U. S. C. 863; Toll Brief, S–6). But it is perfectly clear that an employee, like Mr. Toll, separated in a reduction in force under Section 12 of the Veterans' Preference Act, is not entitled to the type of hearing provided in Section 14. *Ashley* v. *Ross*, 89 U. S. App. D. C. 339, 191 F. 2d 655; *Fass* v. *Gray*, 91 U. S. App. D. C. 28, 197 F. 2d 587, certiorari denied, 344 U. S. 839. The hearing procedure set up by Section 14 is available only to "preference eligibles in cases involving serious disciplinary action for cause." *Flanagan* v. *Young*, 228 F. 2d 466, 472 (C. A. D. C.); *Murphy* v. *Wilson*, 236 F. 2d 237 (C. A. D. C.), certiorari denied, 25 U. S. Law Week 3185, Dec. 18, 1956; *Washington* v. *Summerfield*, 228 F. 2d 542 (C. A. D. C.). It has no application where an employee without fault is separated under Section 12 because of a reduction in

force. Section 12 alone is operative in the latter situation.

In any event, the record shows that Mr. Toll was not denied any substantial or material rights in the course of his administrative hearing. Thus, the alleged denial of his right to examine the retention register is pointless. His need for examining the entire register arose out of his attack on the "excess narrowness of the competitive level" (Toll Brief, p. 36). But, the record shows that even if the competitive level had been expanded to include *all* GS–11 attorneys, Mr. Toll still would have been reached for separation (J. A. 47). It is significant that the record also reveals that appellant was shown "the retention register covering all excepted attorneys in the headquarters office of the Federal Trade Commission several days after he was issued his reduction-in-force notice" (J. A. 46).

Identical considerations show that he was not prejudiced by the alleged denial of his right to present additional evidence on the issue of narrowness of the competitive level. For, no matter how cumulative the evidence, the fact remains that even if all GS–11's were in his competitive level he would have been separated. Furthermore, if the evidence he sought to present related to Sloan's and Hubler's jobs, it was properly rejected because they occupied GS–9 positions in a different and lower competitive level.

One final argument should be considered. It is contended that under this Court's decision in *Goldman* v. *Summerfield*, 94 U. S. App. D. C. 209, 214 F. 2d 858, 859, the grant of summary judgment below was improper. But in *Goldman*, the Government failed (1) to file an answer, (2) to submit affidavits, and (3) to vouch for the authenticity of the exhibits. The case now here is entirely different. The present record shows (1) an answer was filed (J. A. 34–39), (2) affidavits were submitted (J. A. 46), and (3) the exhibits were properly authenticated (J. A. 40, 44).

Other contentions raised by Mr. Toll (pages 37–45) call for no specific answer. It will suffice to note that the asserted additional errors were, if in fact committed, (1) harmless, (2) predicated on the mistaken assumption that he was entitled to a Section 14 hearing, or (3) in any event, "without merit as

reasons for judicial relief" (J. A. 47; see *Smith* v. *Dulles*, 236 F. 2d 739, 741 (C. A. D. C.), certiorari denied, 25 U. S. Law Week 3185, Dec. 18, 1956; *Levy* v. *Woods*, 171 F. 2d 145, 146 (C. A. D. C.); *Hammond* v. *Hull*, 76 U. S. App. D. C. 301, 131 F. 2d 23, 28, certiorari denied, 318 U. S. 777).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON 25, D. C.

DAE: LWV: jm

APRIL 9, 1954.

Mr. OLIVER W. TOLL,
2 Newlands Street,
Chevy Chase 15, Maryland.

DEAR MR. TOLL: Further reference is made to the appeal submitted by you against the reduction in force action of the Federal Trade Commission in separating you from your position of Attorney-Advisor, GS–11.

A review of your case has failed to disclose any irregularities under the Retention Preference Regulations covering reduction in force actions.

Investigation disclosed that the competitive area and the competitive level were in accord with the regulations; that the retention register was properly set up; that your name was reached in order; and that you received a valid notice.

Careful consideration has been given to all of the questions raised by you and your representatives in your appeal and at your hearing that have a bearing on the reduction in force action and over which the Civil Service Commission has jurisdiction.

Investigation disclosed that you had personal competitive status acquired during previous Federal employment under the provisions of the Ramspeck Act and Executive Order 8743. The records further disclosed that at the time you received the reduction in force notice, you were serving under a Schedule A excepted appointment under Regulation 6.101(d) without competitive status in position and with indefinite tenure.

The competitive area used in the action was the departmental service in Washington, D. C., which is in accord with the regulations and was not restricted to a bureau, branch, or division.

The competitive level was found to include all those Attorney-Advisor positions in the excepted service in grade GS–11, the official duties of which were sufficiently alike as to permit the free interchange of incumbents placing such em-

ployees in direct competition with each other. This, too, was found to be in compliance with the Retention Preference Regulations. Such a grouping of employees is necessary in order to determine the relative retention rights of employees for remaining on or for being separated from their official positions and duties for which they are paid. Temporary details from their positions, temporary assignments to other duties, and abilities to perform other duties are not factors that can be considered in determining these relative retention rights.

The retention register was found after careful checking to include the names of all the incumbents of positions of the same grade—GS–11; in the same service—excepted; in the same position classification series—Attorney-Advisor; in the departmental service in Washington; and whose official duties as set forth on classification sheets of record were sufficiently alike as to making incumbents interchangeable. The register included the names of four employees, three in addition to your own. The retention classification and order of standing on the register was found to be correct—the other three placed in Subgroup I–A and your own in Subgroup III–A, thereby placing your name on the bottom of the register. Your name was, therefore, properly reachable upon determination of the agency that it would affect a separation of one or more employees from your competitive level by reduction in force procedures.

It was finally found that the reduction in force notice issued you was a valid notice under the Retention Preference Regulations.

The Civil Service Commission is, therefore, unable to sustain your appeal.

No further appeal to this decision will be entertained unless it is submitted to the Commissioners, U. S. Civil Service Commission, Washington 25, D. C., within seven (7) days of receipt of this decision. Additional representations should be made in writing and submitted in duplicate with the appeal to the Commissioners.

Sincerely yours,

E. A. DUNTON,
Chief, Appeals Examining Office.

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON 25, D. C.

BAR:GT:jg

SEPTEMBER 30, 1954.

Mr. OLIVER W. TOLL,
2 Newlands Street,
Chevy Chase 15, Maryland.

DEAR MR. TOLL: Reference is made to your appeal from the decision of the Appeals Examining Office that there were no irregularities in your separation, because of reduction in force, from the position of Attorney-Adviser, GS–11, Federal Trade Commission. A review of the file in your case reveals that you question the necessity for the reduction in force; that many attorneys with lesser retention rights under the Veterans Preference Act were retained in the reduction-in-force proceedings instead of you; that you have competitive status and should have been so considered in the reduction-force-action; that you had been advised by the Director of Personnel that the entire Washington area was the competitive area for the reduction in force; that the competitive levels were too narrow as they should have included attorneys in other divisions, including trial attorneys; that the preparation of separate retention registers for attorneys with competitive status and those with excepted status was illegal in view of the provisions of Executive Order No. 10463; and that you were denied access to information which you believe should have been made available to you.

Inherent in management authority is the right to determine the number and types of personnel required to carry on the functions of the agency. Such determination is not subject to review by the Civil Service Commission. The Commission's Retention Preference Regulations do not contain authority to review the agency's decision to abolish any particular position, they establish degrees of retention preference and uniform rules for reduction in force.

The Commission's authority to promulgate the Retention Preference Regulations is contained in Section 12 of the Veterans Preferance Act of 1944, which states that in any reduction

in personnel "in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings." You will note that "tenure of employment" is given priority over "military preference" in the list of factors to be considered in the retention of employees.

Altho you had acquired a competitive status in 1942 while employed in the Bureau of Internal Revenue, your indefinite appointment to the Federal Trade Commission on June 11, 1951, was after a break in service and was made under the authority of Schedule A, and you were, therefore, correctly placed in retention subgroup III–A.

The matter of the competitive area was discussed at the hearing and you were advised at that time that the headquarters office in Washington, D. C. was the competitive area, a separate competitive area being established for the Washington, D. C., field office. This is in accordance with the Retention Preference Regulations.

In making determinations as to which positions should be included in a competitive level, the duties of the position are controlling, rather than the qualifications of individual incumbents. In other words, positions are not in the same competitive level unless interchange of personnel is feasible in both directions. For this reason trial attorneys and attorney-advisors have been uniformly recognized as being in separate competitive levels in reductions in force. The fact that certain employees have served in a number of different divisions would not be evidence that the positions in those divisions are interchangeable. At any rate, the agency has certified that you were the only GS–11 attorney in the Headquarters office of the Federal Trade Commission in retention group III, and the competitive levels therefore had no bearing on your separation since you would have been the first employee separated had all GS–11 attorneys in the headquarters office been included on one retention register.

According to the records of the Commission, you were offered an opportunity to review the retention register jointly with the Commission's investigator, but you declined the offer. It also appears that much of the information you sought is not required to be made available to employees affected by a reduction-in-force action.

In view of all the facts in your case, there is no basis for sustaining your appeal. The previous decision in your case is therefore affirmed.

For the Commissioners:

Sincerely yours,

JOHN E. BLANN,
Chairman, Board of Appeals and Review.

cc: Director of Personnel
Federal Trade Commission
Washington 25, D. C.
cc: Mr. Edward A. Dunton
Chief, Appeals Examining Office

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON 25, D. C.

BAR:ST:rec

NOVEMBER 2, 1954.

Mr. OLIVER W. TOLL,
2 Newlands Street,
Chevy Chase 15, Maryland.

DEAR MR. TOLL: Reference is made to your letter of October 5, appealing from the decision of this Board that there was no violation of your rights in your separation, because of reduction in force, from the position of Attorney-Adviser, GS–11, Federal Trade Commission.

In your appeal, you contend that you should have been accorded reassignment rights with respect to positions held by employees having lower retention rights than you, including the positions occupied by Kenneth L. Sloan and Lynn M. Hubler. In this connection your attention is invited to Civil Service Regulations, Section 20.5 (b), which states that "No employee in a position excepted from the competitive service may be separated, furloughed for more than 30 days, or reduced in grade or pay in a reduction in force if a *competing* employee with lower retention standing is retained in the same competitive level." [Emphasis supplied.] Messrs. Sloan and Hubler were not competing employees under the terms of the Retention Preference Regulations inasmuch as they were serving as Attorney-Adviser, GS–9.

You will note that no provision is made for reassignments of employees serving in excepted positions who are affected by a reduction in force. However, even had you been eligible for reassignment under the Retention Preference Regulations, you could not have displaced either Mr. Sloan or Mr. Hubler since they both were in retention subgroup III–A, which is the retention subgroup in which your name appeared in your competitive level. The Regulations do not permit reassignments to positions occupied by employees in the same subgroup as that occupied by the employee being reassigned.

The fact that you were the only GS–11 attorney in the Headquarters office of the Federal Trade Commission in retention group III was verified by the Commission's investigator prior to the decision on your appeal by the Appeals Examining Office.

Prior to the decision on your original appeal, a careful investigation was made by the Commission at the Federal Trade Commission regarding the competitive levels set up and the retention registers for those competitive levels. Since employees serving in excepted positions have no mandatory rights to reassignment, the sole issue before the Commission was whether or not you had been properly reached for separation.

Since the Commission's investigation revealed that you were the only GS–11 attorney in the headquarters office of the Federal Trade Commission in retention group III and inasmuch as you were correctly placed in that retention group, under the Regulations you would be the first employee to be affected by a reduction in force of GS–11 Attorneys in the competitive area.

There is, therefore, no basis upon which your appeal may be sustained, and the previous decision is therefore affirmed.

For the Commissioners:

Sincerely yours,

JOHN E. BLANN,
Chairman, Board of Appeals and Review.

cc: Director of Personnel
Federal Trade Commission
Washington 25, D. C.

cc: Mr. Edward A. Dunton
Chief, Appeals Examining Office

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For the
District of Columbia Circuit
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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,472

OLIVER W. TOLL,

Appellant

v.

JOHN W. GWYNNE, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER W. TOLL
Appellant Pro Se

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Washington, D. C.
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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,472

OLIVER W. TOLL,
Appellant

v.

JOHN W. GWYNNE, ET AL.,
Appellees

REPLY BRIEF FOR APPELLANT

PLAINTIFF'S CLAIMS OF ADMINISTRATIVE ERRORS
(Arranged by nature of claim)

	Heading where discussed in plaintiff's briefs.
ILLEGAL DISCHARGE	
Supported by three independent, alternative grounds, namely:	
Regulations' illegality in denying competition . . .	II
Plaintiff's discharge was caused by (and would not have occurred without) arbitrary barriers in the regulations to the right of competition granted by Section 12 of Veterans' Preference Act.	
Denial of due process in the Civil Service Commission appeal	V
The administrative hearing which the regulations accord must be fair: denial of a fair hearing rendered plaintiff's discharge illegal.	
Bogus character of the reduction in force.	VI
The reduction in force was ultra vires and a violation of merit system rights	
ILLEGAL DENIAL OF REEMPLOYMENT	III
Plaintiff was denied reemployment rights given by Section 15, 7, and 8 of the Veterans' Preference Act.	

A different order than the analytical one shown above was followed in plaintiff's opening brief, because the denial of reemployment (plaintiff's second claim, supra) and the illegality of the regulations (the first ground for plaintiff's first claim) are logically related. Both are related to:

	Heading in plaintiff's briefs.
Scope of Veterans' Preference Act . . .	I
and	
Discriminations against the "excepted service"	IV

Headings VII and VIII of the opening brief deal with grounds of reversal originating in the District Court.

Contentions in defendants' brief will be discussed as they relate to plaintiff's argument, and in the order followed in plaintiff's opening brief.

I.

THE VETERANS' PREFERENCE ACT HAS GIVEN VETERANS ENFORCEABLE MERIT SYSTEM RIGHTS.

That Act is the foundation of plaintiff's right to judicial redress for illegal discharge and denial of reemployment.

In response to that claim, defendants have cited many cases in which employees' appeals have failed. On these they base the suggestion that there is a "doctrine" of "judicial non-intervention in the field of personnel administration". (Defendants' brief, page 9.) A better explanation[1] is that prior to the Veterans' Preference Act Government employees possessed few rights. A purpose of that Act was to change that situation,

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[1] Magna Charta (1215): "We will sell to no man, we will not deny to any man, either justice or right."

and to give Government employment more than administrative status.[1] Such an intent, unless qualified by Congress,[2] implies the creation of rights which are not inherently vulnerable to abrogation by merely administrative action, but rank with other rights. Other rights are often subject to administrative adjudication, with only a circumscribed right of judicial review. So here: plaintiff concedes that a quasi-judicial determination, such as one by the Civil Service Commission on a reduction in force appeal, is ordinarily not reviewable so far as it is:

a. Within the scope of the permitted administrative appeal;

b. Pursuant to a fair hearing; and

c. A nonarbitrary decision of fact.

However, plaintiff submits that in the instant case he is entitled to the court review customarily allowed in the following cases:

1. Where regulations contravene the controlling statute.

   (Such is the case as to the provisions of the Regulations attacked in headings II and III of plaintiff's briefs.)

2. Where administrative action involves clear error, and either: (a) no administrative review is available, or (b) the error is one of law.

   (Such, on both counts, is the denial of plaintiff's re-employment rights, --heading III of plaintiff's briefs.)

3. Where an administrative adjudication allows no fair hearing.

   (Such is the case as to the Civil Service Commission's appeal proceedings, -- heading V of plaintiff's brief.)

---

1 Representative Starnes, who introduced the bill, stated on May 19, 1944, (Hearings before the Committee on Civil Service, United States Senate, 78th Cong., 2nd Sess., page 8): "It is the desire of the veterans' organizations that the existing Executive orders and administrative orders giving veterans preference should be adopted by the Congress of the United States as a national policy and thus give them the sanctity of legislative approval." /Here, and elsewhere in this brief where not otherwise indicated, emphasis is supplied./ Cf., also, plaintiff's opening brief, page 15.

2 The rights given by the Lloyd-LaFollette Act, 5 U.S.C. (1927 ed.) Sec. 652, were specifically restricted by the provision in that act that removals could be made administratively without trial or hearing. Naturally under that statute the right of judicial review is correspondingly restricted. The Veterans' Preference Act contains no such restriction.

4. Where administrative action is ultra vires administrative power, and where no administrative review is available.

(Such was the bogus reduction in force, -- heading VI of plaintiff's briefs.)

II

ILLEGAL DISCHARGE BECAUSE OF REGULATIONS' ILLEGALITY IN DENYING COMPETITION

Plaintiff's claim here is that certain provisions in the reduction in force regulations were illegal insofar as they denied him the right to compete for retention in employment in positions for which he was qualified and available, since Section 12 of the Veterans' Preference Act clearly gave him that right.

Defendants' response consists in assuming that an employee's right to compete for positions is not directly related to what is reasonable and will carry out the statutory purpose, but depends solely on whether he has obtained membership in a group called "competing employees", and that the latter question is determined simply by reference to his current position. Instead of looking to the substance of the statutory direction, as applied to the facts, to determine the extent of the right given by the statute, defendants turn instead to nomenclature. They seize upon the phrase "competing employees" as if statutory right depends simply upon the name for it. Then they appropriate that name to their own use: they have named employees "competing employees" merely by reference to their current position, and have assumed that the group thus named may compete only for positions of the same sort as their current ones.

Plaintiff replies by five arguments, as follows:

1. The legislative background of the Veterans' Preference Act shows that references to "competition" refer to qualifications for the positions sought.

The word "competing" and its cognates, "compete", "competitive", and "competition", as used with reference to obtaining Federal

employment have an established history and meaning in civil service legislation.

a. In the Civil Service Act.

Section 2 (second) of the Civil Service Act directs the establishment of rules to provide, among other things, "for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder." The expression "the public service now classified", etc., refers to standardized "classes" of positions, -- positions "arranged in classes". In Section 7 Congress speaks of the entry of new employees "in ... the said classes", showing that Congress is thinking in terms of positions.

Again in Section 2 it is provided that "all the offices, places and employments so arranged ... in classes shall be filled ... as the result of such competitive examinations." The "competitive" examinations are examinations to determine which applicants are best qualified for the positions.

Section 2 (second) Seventh provides for "noncompetitive examinations in all proper cases before the Commission, when competent persons do not compete, after notice has been given of the existence of the vacancy ...". The "vacancy" is, of course, vacancy of the position to be filled. The vacancy may be filled "noncompetitively" (i.e., without choosing between two or more competitors) in cases where no alternative choice is possible. Cases where the position is not sought by more than one competent person are cases "when competent persons do not compete", i.e., for the position.

In these provisions the terms "compete" and "competitive" refer to aspirants for positions between whom questions of relative qualifications for the positions are to be decided by examinations. They describe situations in which persons are striving against one another to obtain the same position, either by original appointment or by promotion, for

Section 7 provides that such examinations shall also be used to determine promotions. They imply a relation to the filling of a position, -- that the applicant desires the position, and that competition is to determine his fitness and competence for the position. The provisions for competitive examinations and for noncompetitive examinations alike show that unless an applicant is qualified for the position he is not to obtain it. But there is no implication that a person may not compete for any position for which he is qualified and competent. There is no implication that eligibility to "compete" depends upon the applicant's occupying some other position, at or before the time he seeks to compete for the position in question.

b. In Congressional consideration of the Veterans' Preference Act.

The bill, H.R. 4115, which became the Veterans' Preference Act of 1944, was entitled: "A bill to give honorably discharged veterans ... who desire to compete for employment, preference in employment where federal funds are disbursed." The idea of competition was sufficiently basic to the Veterans' Preference Act to form a term in the title of the bill. As thus used the word "compete" signified, as it had in the Civil Service Act, the desire to contend against other aspirants for a position. As in the Civil Service Act, there is again the implication that the veteran must be qualified for the position sought. But there is no implication that the veteran is not free to compete for any position for which he is qualified, nor that he may compete only if employed in certain other positions, nor that his competition will be limited to competition for positions similar to them.

A letter from President Roosevelt to Chairman Ramspeck, endorsing H. R. 4115, was attached to House Report 1289, 78th Cong. 2d Sess. It suggested that "where competition is not restricted solely to veterans, provision should be made for adding points to the earned ratings of veterans who compete for positions in the Federal service." The context does not suggest that a veteran's right to "compete" for a

position is limited to some narrow field of competition restricted by reference to his prior employment in a position interchangeable with that sought.

Throughout the bill and its consideration in Congress there is a clear intent to give the widest possible scope to veterans' competition for federal employment, an intent inconsistent with inserting by implication into the term "compete" any special limitation based upon current occupancy of some position other than that for which he seeks to compete.

Nor is there an implication that the word "compete" refers only to competitions for vacancies. Prior to its passage on April 17, 1944, Mr. Rees, a member of the House Civil Service Committee, stated in the House (Congressional Record, volume 90, page 3504):

> "Mr. Speaker, I think this legislation could go still further and give the veterans a chance to compete for positions that have been filled in any agency of the government since the emergency was declared. * * *"

He referred to permitting a returning veteran to displace a nonveteran incumbent of a position, upon showing superior qualifications. As Mr. Rees' statement shows, such a provision was not contained in the Bill; but his use of the word "compete" in that connection shows the meaning in which in the consideration of the Veterans' Preference Act that word was understood. It referred to the contending for any position, whether vacant or occupied, for which, on the basis of qualifications, the veteran could establish a superior right. No further limitation lurked in the meaning of the word. There was no suggestion that the word "compete" contained an implicit restriction which would exclude persons who had not occupied another position, or would limit them to competing with others at the moment occupying interchangeable positions.

There is no need to multiply examples. The word "competing" has been used time and again with respect to seeking employment in the Federal service: and it does not carry, and never has, any implication of

some peculiar restriction related to current occupancy of some other position, which excludes from its scope aspirants who are qualified and available for an existing position which they seek.

2. The word "compete" itself implies reference to the subject of competition.

Websters International Dictionary defines "compete" as

> "To contend emulously; to seek or strive for the same thing, position or reward for which another is striving; to contend in rivalry, as for a prize or in business; as tradesmen compete with another."

Inherent in the meaning of "competing" is the idea that competitors compete for "the same thing, position or reward". People can compete only by competing for something. An object of competition is necessarily implied. To abstract the idea of "competition" from its object deprives the term of meaning. To give the grant of retention rights in Section 12 reasonable effect it must be read with common sense as referring to the actual competition which actually occurs in a reduction in force.

An employee cannot remain in employment without a position. Scarcity of positions, caused by a reduction in force, causes the "competition". One does not compete for a position which is currently held but being abolished. Who wants the job that has gone? To compete for retention one competes for the remaining positions. Cf. John A. Overholt,[1] "Discussion of Lay-Off Procedures", 15 Public Personnel Review 133, 135 (July, 1954). Referring to the phrase "competing employees", and the question, "What are they competing for?", he explains:

> "That is a very interesting point.* * * It has led to some improvements in our regulations.[2] We had worried because the law said nothing about qualifications in reductions in force. However, it

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1 Formerly Chief of the Performance Rating Section, Civil Service Commission, and in charge of the reduction in force program in the Government. The article is cast in the form of a talk by a hypothetical "director of personnel".

2 This seems to refer to Regs. Sec. 20.2 (c) and (d), which were added to the regulations by publication in the Federal Register, Dec. 25, 1952, 17 F.R. 11733.

> did provide that only competing employees are to be considered. They are not competing to be let out -- they are competing to be retained. They can be retained only in specific jobs -- either in their old jobs or in new jobs. They have to be qualified before they can compete. * * * When they compete for retention in particular positions in a reduction in force, they must have all the skills and abilities needed in such positions. * * *"

Just as competition for remaining positions is limited to employees who are qualified and available to fill them, similarly, when an employee is qualified and available for a position, he is able to be a competing employee for that position. Such is the plain, common-sense meaning of the language in Section 12. That interpretation gives the statute reasonable effect. It protects the efficiency of the organization, and it gives reasonable scope to the rights of the employee. The language does not refer to an abstract bond between employees, -- one not related to the actualities of the situation, one resting not on the positions for which they now compete but upon other positions now eliminated.

3. Practices in industry are inconsistent with defendants' construction.

Under collective bargaining agreements, millions of employees of private industry are entitled to have their release by reductions in force governed by rules under which they may compete for retention in employment. Such agreements represent the practical development in the light of experience of what is necessary to produce operational efficiency, employee security, and their essential bond, employer-employee morale. Congress, in providing by Section 12 of the Veterans' Preference Act standards to govern layoffs by the nation's largest and supposedly model employer, legislated in the light of that background. The scope of the competition intended may be inferred by referring to the arrangements in business and industry when a similar

formulation of standards is made to apply to a similar situation. Presumably Congress' enactment of layoff standards was intended to have equal scope.

"In providing for the possibility of fluctuations in the need for workers, most agreements set forth the basic ground rules governing the order in which workers will be laid off and recalled to work. The principle that relative seniority, or length of service, shall be an important, if not the only factor, in determining the order of layoffs is widely established in collective bargaining agreements."[1] The Government, as a model employer, should be governed so far as practicable by the principle of continuity of employment.[2]

"The general purpose of a seniority rule is to assure the retention of senior employees during reductions in force. However, the impact of curtailed employment and the composition of the work force in terms of length of service may vary among the different occupations and departments of an establishment. Consequently, a long-service employee may be scheduled for layoff because -- for the time at least -- his job is no longer necessary to plant operations, while at the same time a junior employee doing a necessary job is scheduled for retention. The collective bargaining agreement, therefore, may grant the senior employee the right to 'bump' the junior employee, displacing him and taking over his job. In turn, the displaced worker can bump some other employee with still less seniority than his own. Bumping may occur within the seniority unit established for layoff purposes or cut across seniority units, depending on the bumping rights provided by the contract. In general usage, bumping implies lateral transfer

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1 U.S. Department of Labor, Bulletin No. 1189, "Collective Bargaining Clauses: Layoff, Recall, and Work-Sharing Procedures" (1956), page 15. Since ordinarily older employees are less able to make a new start and are more dependent on retaining employment, seniority is ordinarily the major element in layoff rules.

2. Mosher and Kingsley, "Public Personnel Administration", page 355.

or demotion. However, in some instances, bumping upward is permitted."[1] Such bumping procedures are common.[2] "By limiting the application of seniority to clearly defined occupational groups within the department, management is freed from the annoyance of cumbersome bumping in that all workers retained are presumably qualified by experience to perform available work.[3] "If it is a case of stepping back to a lower job in the line of progression, [the worker] is capable to take over the less involved job. The employer should not be allowed to take advantage of adverse economic conditions to pick and choose between his employees or to express and show preference."[4]

Thus practices in business and industry recognize that to give normal scope to competition in a layoff it must include reasonable reassignments. They are the normal and necessary operation of any standard of layoff rights. Congress must have intended that the standard which it prescribed should have normal scope.

4. Defendants' construction of "competing employees" violates the definition of that term in Regs. Sec. 20.2(c) and (d).

Regs. Sec. 20.2(c) provides:

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1 Bulletin No. 1189, note 1, supra, page 24. Since the normal employee's career is one of promotion from lower to higher grades, higher grades will generally be occupied by senior employees. In a period of contraction affecting all levels of employment it would be impossible to give effect to seniority rights unless senior employees whose positions are abolished were able to displace junior employees in positions in the same line of work.

2 Harbison, "Seniority Principle in Union-Management Relations", Princeton University, Industrial Relations Section, Department of Economic and Social Institutions (1939), page 10. Defendants have referred to Senate Report 2102, which suggested modification of reassignment rules, but not so as to deny reassignment rights to senior employees having 15 or more retention credits based on length of service (Report, page 41). Hence defendants seek to apply the Report's comments to a case where the Report recommends that reassignment rights should be allowed. The basic vice of present reduction in force procedures is that under pretense of administrative reasons for making cuts in one particular "level" or another -- a decision which is subject to no review -- agencies are able to fragment personnel into small groups (in the instant case averaging about two employees each) and then actually make selections for personal rather than functional reasons, thereby defeating the policy of the Act that personnel selections shall be made by rule. Reassignment rights interfere with that evasion of the statute, which largely explains the executive antipathy to them. It is unlikely that Congress intended that the statute should be frustrated in that manner.

3 Harbison, op. cit., page 28

4 "Layoff Policies and Practices", Report 82/1950, Princeton University, Industrial Relations Section, Department of Economic and Social Research, page 46.

> " 'Competing employees' for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position."

This definition recognizes that competition in a reduction in force, like competition to fill a vacancy, must necessarily be for a position, and that the term "competing employees" is to be defined from the standpoint of competing employees "for any position." Since the competition exists with reference to a position, the qualifications required to fill the position must determine the scope of the competition. Hence in Sec. 20.2(c) "competing employees" are defined with reference to the position -- "for any position".

It follows from the definition of Sec. 20.2(c) that in a reduction in force an employee may well be a "competing employee" with regard to more than one position. Under Sec. 20.2(c) there is no reason why an employee may not be a "competing employee" for positions in the grade which he currently occupies, and also for positions in the grades immediately below, if he is qualified for them also. As to the latter, it is immaterial that employees in the lower grades would not be considered as qualified for the higher position. There is no requirement in Sec. 20.2(c) that an employee cannot compete for a lower position unless an incumbent of that position could also compete for a higher one. Sec. 20.2(c) and (d) indicate that "competing employees" for each position are to be determined according to the qualifications required for that position, and do not indicate that there is any other restriction.

The fact that Subsection (c) includes, as one of the "competing employees", "the incumbent, if any" implies no intention to subordinate the test of being qualified for the position in favor of some other test based on incumbency of positions. The "position incumbent" is included simply as an instance of a qualified employee: his occupancy of the

position must be admitted as establishing his qualifications.[1] Moreover, Regs. Sec. 20.2(c) is followed immediately by Sec. 20.2(d), explaining the meaning of "qualified for a position". There was no need to insert Sec. 20.2(d) if "competing employees" could be determined wholly by looking at what positions employees happened to be currently occupying. Subsection (d) underscores the fact that ascertainment of "competing employees" depends wholly on the qualifications for the particular position for which the employees compete.

Defendants' argument attempts to substitute the regulations' definition of "competitive level" in the place of the regulations' own definition of "competing employees", and to make barriers in the procedural provisions supersede a rational application of the statute required by the regulations' own interpretation of the statute.

5. The "reassignment" provisions refute defendants' construction.

Defendants' present contention is that the "reassignment" or extra-level competition which the regulations grant does not apply the statute, but exists under a different kind of nonstatutory authority. But the "reassignment" provision occurs in the same subsection which also contains one of the intra-level competition provisions (Regs. Sec. 20.5 (b) (1) and(2)), - one sentence for each. The "reassignment" provisions are integrally a part of the entire scheme of the regulations, with no indication that they are based on ~~any~~ separate authority.

It is apparent that in providing for "reassignment" rights the Commission in fact believed that they were providing for the very kind of competition decreed by the statute. If those provisions are not within the scope and spirit of the statute, why were they inserted?

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[1] The specific inclusion of "the position incumbent, if any," merely prevents evasions. Thus: (1) To permit the incumbent's qualifications to be attacked would permit reduction in force proceedings to be utilized as a method of trying the incumbent for incapacity without allowing him the protections of of Section 14 of notice and hearing. If he is incompetent, a reduction in force is not the proper proceeding in which to establish that fact. Also, (2) To permit a test of the incumbent's qualifications, which are presumably really adequate, would open the door to testing for super-qualification, thus superseding the statutory standard.

III.

ILLEGAL DENIAL OF REEMPLOYMENT RIGHTS

Denial of plaintiff's rights to reemployment under Section 15, 7 and 8 of the Veterans' Preference Act is a separate cause of action (not a "subsidiary contention").

Defendants' brief concedes that the fact that plaintiff's "separation [was] from an 'excepted' attorney position, rather than [from] one in the competitive or classified service, does not * * * affect the applicability of Section 15" (which grants reemployment rights). Elder v. Brannan, 241 U.S. 277, 289. In the present case, as in Elder, the positions from which the employees were separated and in which reemployment was sought were all of them "excepted". 341 U.S. 287-288; Civil Service Regulations, Part 6, Sec. 6.100 (d), 5 C.F.R. Sec. 6.100(d).

Under Section 15 of the Veterans' Preference Act, plaintiff was entitled to reemployment rights[1] both by having his name listed on the reemployment list of the Federal Trade Commission, and also on those "as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government * * *." Elder v. Brannan, supra.

A. As to the Federal Trade Commission.

Defendants' only answer here (defendants' brief, top of page 13) is that plaintiff's name was "carried on a re-employment list for a full year", and a year was enough. Whether a year was enough tenders a false issue, because violations were within the year. New employees, listed in plaintiff's opening brief by name (pages 28-29), were hired in violation of the last sentence of Section 15. Plaintiff's rights were violated with complete sincerity, under the belief that they did not exist. See Mr. Delaney's testimony (JA 26-27):

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[1] This question was not appealable to the Civil Service Commission, since the regulations restricted appeals as to reemployment to employees separated "from competitive service positions". Regs. Sec. 20.7(a) and (d).

"***Other than to list the people and to consider them, there is no purpose for keeping a reemployment list. There is no requirement, when we are hiring new attorneys, that they be in the top ten or the top five scores. No such requirement. * * *

* * * *

"Q. You do not have to give a preference to veterans on the reemployment list? A. They have no preference which we must give them.

"Mr. Ryan: To keep this straight in my mind, this is a person who is on the re-employment list?

"The Witness: That's right.

"Q. And you do not consider the scores for a man on the employment list as against the scores of the men on the new employment register? A. That is correct."

Plaintiff was also entitled to further rights, the "rule of three" (body of Section 8), and the rule against being passed over (proviso of Section 8). There is no claim that these rights were observed. Defendants say that it was enough to put plaintiff's name on a list.

B. As to the Civil Service Commission.

Plaintiff made application to the Civil Service Commission, and received no assistance.[1]

Part 21 of Civil Service Commission regulations purports to implement the employment and reemployment provisions of the Veterans' Preference Act. It applies to all "excepted" positions in the executive branch of the Federal Government, and specifies the various requirements of the Act as to appointments, etc. Under those regulations priorities in appointments are determined, not by direct reference to an applicant's rights under the Veterans' Preference Act, but mediately, by according those preferences only to those applicants whose names appear on the agencies' reemployment lists. Regs. Sec. 21.6 (d)(i)(c) and

1 Plaintiff asked for reemployment. JA 112. Defendants say that the sentence quoted from the answer was not responsive. The letter is at JA 126-127, and in entirety at R. 563.

and (ii) (b), 5 C. F. R. 21.6 (d). The same regulations at Sec. 21.6(b) provide: "Reemployment list. The reemployment list will consist of the names of former employees of the agency who are to be considered for future employment * * *". By repeated references it is limited to "former employees of the agency". Apparently actual operations follow those directions.

Thus the regulations issued by the Commission under the Veterans' Preference Act insure that, except from the agency which discharged him, a veteran will receive no benefit from the reemployment provisions of that Act.

IV.

DISCRIMINATIONS AGAINST THE "EXCEPTED SERVICE"

Apparently defendants do not deny that the numerous discriminations (as to both discharge and reemployment) based on a veteran's incumbency of an "excepted" position violate the Veterans' Preference Act.

V.

DENIAL OF DUE PROCESS IN THE CIVIL SERVICE COMMISSION HEARING

Defendants' brief imputes to plaintiff the contention that Section 14 of the Veterans' Preference Act applies to reduction in force appeals. The claim was not made. Plaintiff says that the grant of a right of administrative appeal (Regs. Sec. 20.9) subjects plaintiff's rights, within the limits of (a) the scope of the administrative appeal, (b) the according of a fair hearing, and (c) the nonarbitrary decision of factual issues, to a binding administrative adjudication, from which there is no review. Since within those limits the administrative hearing constitutes the final determination of the employee's rights, cutting off judicial review, for that very reason the hearing must be a fair one. That requirement rests upon the basic principle that rights may not be concluded without a fair

hearing. And if the employee's rights are of "life, liberty or property" within the meaning of the Fifth Amendment (as plaintiff claims they are), then his right to a fair hearing is Constitutionally protected.

A. Denial of a hearing

Defendants say that the Commission's denial to plaintiff of the right to produce evidence is immaterial because the issue adjudicated by the Commission's hearing was only as to the excessive narrowness of the "level", and "the record shows" that if the "level" had been extended laterally to include all GS-11 attorney positions "in the headquarters office" the result would still have been the same.

The "record" which defendants cite (JA 46) is an affidavit by Mr. Delaney filed in the District Court.[1] The affidavit, if true, fails to show the necessary facts.[2] But even if it did, in a final determination of rights can a post-hearing conclusory affidavit take the place of presenting evidence? If so, there need be no hearing, and a carbon copy of the affidavit may serve as the tribunal's decision.

B. Denial of examination of retention register.

The right to examine the retention register was part of plaintiff's right to contest the correctness of "levels" and "areas". Defendants' reference to Mr. Delaney's affidavit as to what "the record reveals" amounts to asking the Court to disregard the allegation in the complaint that examination of it was refused. JA 13. The facts are these:

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1 After plaintiff's hearing, Mr. Delaney also filed with the Commission a "certificate", making the same allegation. Being able to ignore the difference between what occurs at the hearing and a post-hearing ex parte certificate is one of the advantages in refusing to let an appellant obtain a transcript of the proceedings. Cf. JA 92; JA 87-88; plaintiff's opening brief, page 38.

2 Two further questions remain: (1) Whether the "level" was too narrow vertically, in excluding different grades where work was interchangeable. Under Regs. Sec. 20.2(f) that question was open and factual. Plaintiff was denied the right to submit evidence. JA 94. (2) Exclusion from the "level" of positions in the Washington "Field Office" (their incumbents housed in the same building and under the same Personnel Office) was erroneous if: (a) their functions were interchangeable, and (b) segregation of the Field Office as a separate "area" was unreasonable. Both those questions were appealable to the Commission. JA 121-122. On both plaintiff was denied the right to offer evidence. JA 94, JA 89-90.

(1) Secretaries in the Personnel Office showed plaintiff copies of certain pages (by no means all) of the register (plaintiff's opening brief, page 6, R. 551); (2) Mr. Delaney showed plaintiff the closed register, but never any page (or copy of any page) of its contents, nor offered to do so, except, - (3) Mr. Delaney offered plaintiff the opportunity to examine the page in the register on which his name appeared, but no more (JA 105, 106). Unless these facts were sufficient to satisfy plaintiff's right of examination, the examination to which plaintiff was entitled was refused. If more than these facts is meant by Mr. Delaney's affidavit, its truth is denied (JA 13). Affidavits of Mr. Buehler (JA 106) and Mr. Dawson (JA 92) were tendered in rebuttal as impairing its credibility.[1]

VI.

BOGUS CHARACTER OF REDUCTION IN FORCE

The complaint charged that the reduction in force was ultra vires an administrative purpose and a fraudulent attempt to destroy merit system rights. Defendants' only attempt[2] to rebut these charges was the submission of a certified mimeograph copy of an unsworn "Notice to the Staff", discussed in heading VIII, A, of plaintiff's briefs.

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[1] Mr. Buehler's affidavit as to the interview of January 20, 1954 states: "Regarding the 'competitive levels' within that /Washington/ area, Mr. Delaney said that Mr. Toll could see only his own, since, according to Mr. Delaney, that was the only one pertinent to Toll's case." JA 105. On December 22, 1955, colloquy during Mr. Delaney's deposition: "Q. May I see that?" Mr. Ryan: "Mr. Toll, the policy of the Federal Trade Commission is to permit persons involved to see that portion of the retention register which pertains to them." JA 23. Affidavit of Mr. Buehler: During the entire conversation /of January 20, 1954/ Mr. Delaney did not suggest that he had ever shown Mr. Toll the retention register, or that Mr. Toll had ever seen it, or had ever stated that he did not wish to see it. The implications of the entire conversation were quite the contrary." JA 106. Mr. Dawson's affidavit: "At the hearing /March 2, 1954/ the appellant testified that he had not been permitted to examine the retention register which had been prepared by Mr. Delaney for the reduction in force. Mr. Delaney was present when Mr. Toll gave that testimony and did not attempt to contradict the appellant on that point." JA 93. Mr. Delaney's claim that he had shown plaintiff the retention register appeared for the first time when his affidavit was filed March 2, 1956.

[2] Except in "Counter statement of the case". Throughout this brief, failure to take specific issue with statements in defendants' brief does not concede them.

Even were that memorandum admissible and competent, a material question of fact remained. JA 2-3, 14-15, 51-53. FRCP Sec. 56(c). Plaintiff's claims were not limited to the allegations of the complaint, but included considerable material submitted at the hearing.[1] JA 81-82, 84-85, 88-90, 93-95, 97-100, 100-103, 106-110, 111, 122-123, 125, 128, 128-130. The issue was peculiarly appropriate for trial, since many of the facts were available only through examination of defendants. JA 56-58, 63-64, 74-77, 77-79, 81-82, 127-128. FRCP Sec. 56(e) and (f).

VII.

CURTAILMENT OF PLAINTIFF'S CASE

Plaintiff argues that summary judgment should not be allowed where plaintiff asserts factual claims on which the Court will not permit plaintiff access to evidence in defendants' exclusive possession. This has not been answered.

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[1] The manner of conducting the reduction in force has bearing as to its actual purpose and function. An experienced Federal Trade Commissioner has testified that in view of "the comparatively homogenous character of the legal work of the Commission and the frequency of transfer between different positions" the "artificial small theoretical segments of the attorney staff" involved a procedure obviously "contrary to the facts". JA 100. Another experienced Commissioner summed up his view of the procedure employed with the phrase "an injustice has been done". JA 103. And finally, the Commissioner for Veterans' Cases who rendered an opinion upon the case concluded that the arrangement "was in error in establishing in separate and different 'competitive levels' the positions concerned herein of Attorney Adviser, GS-9, and Attorney Adviser, GS-11". JA 69.

The proceedings were also described in the Report to Subcommittee No. 1 of the Select Committee on Small Business, House of Representatives (Committee Print), 84th Cong. (Oct. 16, 1956):

> "When the reductions in force were applied to the staff of the Federal Trade Commission, they were so arranged that they did not affect the new appointments which had been made to the staff by Mr. Howrey. Instead, the reductions in force hit FTC career staff members, many of whom had long terms of service, ranging to 20 years or more.
>
> "Also the reductions in force were levied heavily against staff members who were carrying on important antimonopoly work. * * *
>
> "It is interesting to note that some of the new personnel appointed to the staff by Mr. Howrey planned and made the arrangements for reduction in force heretofore described which was made at the FTC."

The Report at page 33 takes note of the political slant of Mr. Howrey's operations. Their relation to antimonopoly work of the Commission is noted at page 65. Copies of that report have been filed with the Clerk of this Court.

VIII.

ERROR IN GRANTING SUMMARY JUDGMENT

A. Reliance on unsworn material

Plaintiff (citing Goldman v. Summerfield, 94 U.S. App. D.C. 209, 214 F. 2d 858, 859 (1954)) did not object to the consideration of answer and affidavits, but only to that of the merely certificated material, on which the District Judge expressly relied. JA 132-134. Objection to consideration of such material is not met by saying that the defendants filed an answer and two affidavits.

As to the affidavits: One was relevant only to the denial of examination of the retention register: it raised only a disputed issue of fact. Cf. supra, this brief, heading V, B. The other affidavit was an attempt to substitute Mr. Delaney's conclusion in place of plaintiff's right to a hearing. Cf. supra, this brief, heading V, A. As to the answer: Its affirmative material was limited to a charge of laches (answered by plaintiff's affidavit (JA 112-117), and apparently abandoned by defendants), and a claim of administrative finality (a contention of law).

That left only the certified material as basis for the summary judgment. Whether the rationale of the Goldman case applies to unsworn but certified material is the very question presented in plaintiff's opening brief, page 43. As to that, defendants' only comment (answer brief, page 14) is: "the exhibits were properly authenticated".

B. Lack of basis for summary judgment.

Even had the certified material been properly before the Court, it was not significant. Concerning the denial of reemployment - a separate cause of action - it contained nothing whatever. As to the bogus character of the reduction in force, its only material was defendant Howrey's "Notice to the Staff". In short, defendants presented no substantial affirmative material. Hence the summary judgment can be sustained

only if the allegations in plaintiff's complaint, as amplified and supplemented by the additional material presented by plaintiff at the hearing, was subject to motion to dismiss.

CONCLUSION

Plaintiff prays that the judgment of the Court below be reversed with direction to enter judgment in favor of plaintiff.

Respectfully submitted,

OLIVER W. TOLL
Appellant Pro Se

SUPPLEMENT A.

ANALYSIS OF THE REDUCTION IN FORCE REGULATIONS.

From the standpoint of their function, the provisions of the reduction in force regulations material to this case are of four types, viz.;

I. Defining the statutory standard of competition:

II. Defining the field of competition, viz., "competing employees";

III. Prescribing procedure for conducting a reduction in force; and

IV. Creating barriers to competition.

These provisions will be described in the order stated above.

I. THE STANDARD OF COMPETITION.

Comparative retention standing between competing employees is determined by the seriatim application of the statutory criteria in the following order: (1) tenure; (2) military preference; and (3) length of service and efficiency ratings (combined).[1]

Regs. Sec. 20.2(g) defines "retention standing", as the "precise rank among competing employees for a continuing position", as fixed "by retention group and subgroup, and by retention credits within each subgroup."

The "groups" are described in Regs. Sec. 20.4(c), subdivisions (1), (2) and (3), which provide for grading employees according to the "tenure" shown on their appointment forms.

The "subgroups" are described in the last sentences of each of the subdivisions of Regs. Sec. 20.4(c), and involve simply classification between veterans and nonveterans.

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[1] An exception, not material in the present case, is that temporary employees and those whose current rating is "unsatisfactory" are in effect given lowest priority. Regs. Sec. 20.4(d)(1), last sentence.

The "retention credits" are defined in Regs. Sec. 20.2(h) as giving effect to length of service and efficiency ratings. The third sentence of Regs. Sec. 20.4(d)(1) indicates the basis on which length of service and efficiency ratings are to be computed in determining "retention credits".

II. THE DEFINITION OF "COMPETING EMPLOYEES".

Regs. Sec. 20.2(c) defines " 'Competing employees' for any position" as "the position incumbent, if any, and employees who are qualified for the position." The following subsection -- 20.2(d) -- defines " 'Qualified' for a position" as "having the basic education and experience, and such special skills and aptitudes as are necessary, to take over the position in a reduction in force and render satisfactory service without undue interruption to the work program."

III. PROCEDURAL PROVISIONS.

The regulations assume that which positions (in the abstract) will be eliminated will be decided first, without reference to position incumbents; and that thereafter, as a second step, the particular employees to be dismissed will be selected. Thus:

A. Elimination of Positions.

Regs. Sec. 20.4(b) provides that the agency "will determine competitive levels of positions to be affected by a reduction in force". This is explained on page R3-3 of the Federal Personnel Manual, as follows: "The agency * * * decides * * * what * * * levels shall be cut, and how large a cut shall be made * * *." The "levels" referred to are defined by Regs. Sec. 20.2(f), which says that they contain positions where there is interchangeability of employees in the positions. As construed in the instant case, they were limited to positions in the same series and grade, - in effect, to substantially identical positions.

B. Elimination of employees.

Regs. Sec. 20.5(a) provides in effect that employees whose positions are being eliminated will be "changed to continuing positions,

separated, or furloughed." Whether an employee whose position is eliminated will be moved to another position or will be "separated" (or furloughed) is to be decided by a procedure of two steps, viz.:

1. Intra-level competition.

Regs. Sec. 20.5(b)(1) and 20.5(c) in effect provide for intra-level competition, - i.e. competition inter se between employees whose positions have been placed in the same "level". (This can occur, of course, only when some but not all of the positions in that "level" are eliminated.) Those employees, in that intra-level competition, compete on the basis of their respective "retention standing", the definition of which has been explained supra (cf. heading 1. The standard of competition).

2. Extra-level competition.

Supplementing the intra-level competition, a procedure of extra-level competition is provided for certain employees who fail to retain employment through intra-level competition. They may then compete for continuing positions (although in another "level") for which they are "qualified": Regs. Sec. 20.5(b)(2). (Cf. Regs. Sec. 20.2(c), which also indicates that an employee is a "competing employee" for a position with the position incumbent if he is "qualified for the position". Regs. Sec. 20.2(c). "Qualified" is defined in Regs. Sec. 20.2(d).)

While the intra-level competition occurs between all employees who at the time occupy positions placed in the same "level" (if some but not all of those positions are eliminated), and is to be determined by the full statutory standard of "retention standing" (already described), the extra-level competition is restricted, as described below, both with respect to the employees who may engage in it and with respect to the standard to be applied in determining that competition.

IV. BARRIERS TO COMPETITION.

A. In extra-level competition.

1. Discrimination against employees in "excepted" positions.

Extra-level competition is not open to any employee who occupies an "excepted" position. That restriction is accomplished by providing for such extra-level (or "reassignment") competition for employees who are occupying "competitive" positions (Sec. 20.5(b)(2)), but pointedly omitting any parallel provision for employees occupying "excepted" positions. (In other words, there is no provision in Subsection (c) corresponding to Subsection (b)(2).)

2. Discrimination against employees whose tenure is "indefinite".

Extra-level ("reassignment") competition is not open to an employee who has a position of "indefinite" (group III) tenure. That restriction is accomplished by describing the reassignment competition (in Regs. Sec. 20.5(b)(2)) as with reference only to employees in the so-called "career" (Group I) or so-called "career-conditional" (Group II) groups, and omitting any reference to employees who have "indefinite" tenure.

3. Discrimination against seniority and efficiency.

In such extra-level ("reassignment") competition as may (in spite of the two foregoing restrictions) be obtained, the "competitor" seeking to compete for a position for which he is qualified in another "level" may not compete on the basis of "retention standing" (which gives effect to all statutory criteria, including seniority and efficiency ratings) but is limited to such superiority as he may have either in tenure or in military preference. That restriction is accomplished by describing, in Sec. 20.5(b)(2), the "competitor's" right to compete as related only to positions "in which an employee with lower subgroup

standing is retained" (instead of an "employee with lower retention standing", as in Sec. 20.5(b)(1) and (c)). Thus, tenure and military preference being equal, superiority in seniority and efficiency ratings is of no avail.

However, if the "competitor" was promoted from "an essentially identical position" (cf. Sec. 20.5(b)(2), last clause) such as the position for which he wishes to compete, in that case he may compete for it on the basis of the complete statutory standard ("retention standing"), including the factors of seniority and efficiency ratings. Sec. 20.5(b)(2), last clause.

B. Additional fragmentation provisions.

In addition to the methods of curtailing competition (except for positions "interchangeable" with that which the employee currently occupies, i.e., in the same "level") described in the preceding paragraphs (1, 2 and 3), there are two further respects in which the regulations prevent an employee from competing for positions for which he is qualified. Thus:

1. Fragmentation by areas.

The employee may not compete for a position in another so-called "competitive area". That restriction is accomplished by restricting each "level" to positions located in a single "area" (cf. Regs. Sec. 20.2(f)) and by expressly limiting reassignment competition to positions in the same "area" (Regs. Sec. 20.5(b)(2)). A "field installation" may be in a different "area" from the "headquarters office" (Regs. Sec. 20.4(a)(2)), notwithstanding that, as in the case of the Federal Trade Commission, they are located in the same building and are under the same personnel office.

2. Fragmentation by "services".

No employee in an excepted position may compete for a "competitive" position. No employee in a "competitive" position may compete for an

"excepted" position. These restrictions are accomplished by providing that separate "registers" shall be compiled for each type of position (Regs. Sec. 20.4(d)(2)). The "levels", being in different registers (Regs. Sec. 20.4(d)(1)), are restricted to the type of position carried in that register.

3. Agency options.

"* * * No agency shall be required to fill a vacant position, or to promote any employee, or to transfer any employee to a different duty station, and no agency shall be prohibited from taking such administrative actions. * * *" Regs. Sec. 20.5(d).

"* * * Employees are not required to be given options as to alternative changes possible in any particular case. * * *" Idem.

SUPPLEMENT B

ELDER v. BRANNAN IS NOT INCONSISTENT WITH PLAINTIFF'S POSITION

a. The ultimate holding. With respect to the cause of action as to illegal discharge, Elder v. Brannan, 341 U.S. 277 (1951), held that in making the criterion of tenure superior to that of military service in determining retention standing the regulations did not violate the Veterans' Preference Act.

That holding, of itself, is immaterial to the instant case. Plaintiff does not contest the priority of tenure over military service. An entirely different aspect of the regulations is involved in the instant case. The mandate of Section 12 requires two different matters: (1) formulation of a standard of retention standing ("which shall give due effect to" the four statutory criteria), and then (2) application of that standard as between "competing employees". The Elder case involved only the first problem, - prescribing the proper standard. The instant case involves the second matter, - giving a uniform application of that standard within its proper scope.

b. The subsidiary holding. In the Elder case the Court reached its ultimate holding described above through two subsidiary holdings, viz.: (1) that the primacy of tenure over military service was consistent with the mandate of the body of Section 12 (to give "due effect" to the various statutory criteria); and (2) that the primacy of tenure was not forbidden by the second proviso of Section 12. It was in supporting the second of these subsidiary holdings that the Court referred to the phrase "competing employees", as used in that second proviso.

c. The definitional elucidation. The conclusion that the second proviso of Section 12 did not forbid the primacy of tenure over military service appears to have been reached by holding that the phrase

"competing employees" as used in that proviso refers to employees after they have already been marshalled into the various tenure groups, so that the second proviso takes effect subject to the tenure rules. The term "competing employees", as used in the proviso, was thus held to be used distributively by tenure groups.[1] The idea may also be expressed by saying that the term "competing employees", as used in the proviso, refers only to employees who fall within the same tenure group.

That implication, that the term "competing" as there discussed implies a certain restriction, makes the Elder case at first blush seem to give encouragement to defendants' argument here, which is to the effect that another restriction -- limitation of an employee's competition to the same series and grade currently occupied -- may also be found in the same term.

Plaintiff submits that the definitional discussion in the Elder case cannot impair plaintiff's position in the instant case for the following reasons:

1. The Elder "definition" of "competing employees" would harmonize with plaintiff's contentions.

Plaintiff's argument in the instant case concerns the meaning of the phrase "competing employees" as used in the body of Section 12. Suppose that the Elder "definition"[2] can be applied to that same phrase

1 Report No. 2102, 82nd Cong. 2d Sess., "Reduction-in-Force System in the Federal Government" (1953), at page 21, seems to suggest the possibility that the language of the second proviso may have originated in an "amendment" of March 2, 1929, to Civil Service Commission Circular No. 20, of June 10, 1925, which provided for tenure priorities. If so, in that "amendment" the reference to "competing employees" would naturally have been used distributively with reference to tenure groups; and in throwing the language of that amendment into Section 12 the draftsmen might have intended that it should carry with it the same distributive meaning which it carried in the source from which it was taken.

2 Some inaccuracy may be involved in speaking of the discussion in Elder v. Brannan as though it defined the meaning of the phrase "competing employees", in the sense of "define" (Webster's International Dictionary) as "5. To determine the precise signification of; to fix the meaning ***." Study of the opinion seems to indicate that the words "define", "defined", and "definition" may have been used, at least in some places in the opinion, in another sense of the word, namely (idem): "3. To determine with precision or clearly exhibit the boundaries of; to mark the limits of ***." Thus: 341 U.S. at 282: "The regulations first define "competing" employees on the basis of tenure of employment. ***" Again at page 282: "But the proviso, like the body of Sec. 12, contains the term 'competing' employees which necessarily implies that a veteran's preference operates only within a defined group. ***" Again, at page 285: "In sum, the Commission's retention regulations can hardly be called invalid for making a distinction on the basis of tenure when they reflect a long-standing definition of 'competing' groups, when they were issued by the agency which proposed the statutory language finally adopted, and when Congress indicated no intent whatsoever to supply a new standard." (Emphasis supplied).

("competing employees") as used in the body of Section 12. Then the "competing employees" there described must, by definitional force of that term, be employees who are all in the same tenure category. However, since plaintiff and Messrs. Sloan and Hubler were all in the same tenure category, there is nothing in the Elder definition to negative plaintiff's claim that he was a "competing employee" as to those employees with respect to the continuing positions in Grade GS-9. Elder v. Brannan did not indicate any other or further limitation inherent in the phrase except that of tenure categories. If the term had also contained a further implied restriction -- not only to tenure categories but also to single "levels", -- it seems strange that in the discussion in the Elder case such an implied restriction was not remotely suggested.

2. The Elder "definition" is inapplicable to the body of Section 12.

Although, as just noted, it would not impair plaintiff's argument to apply the Elder "definition" to the phrase "competing employees" in the body of Section 12, plaintiff does not claim or believe that it can be thus applied. To do so would introduce a logical absurdity which would hamper analysis.

For if the Elder "definition" of "competing employees" as referring to employees already separated into tenure groups were used in the body of Section 12, the effect would be to make the body of Section 12 provide that employees already separated into tenure groups "shall be released in accordance with * * * regulations which shall give due effect to tenure" (as well as to the other three criteria). But the criterion of tenure could not establish priority between employees already preselected so that they are alike as to tenure. The direction in the body of Section 12 is inconsistent with the Elder "definition". To construe the basic direction of Section 12 as being already partially accomplished, by virtue of the direction, before the direction is applied, involves involution of subject and predicate. It violates the rule of construction that Congress is presumed to intend a rational and meaningful direction. It would render

absurd a direction which otherwise is simple, straightforward and sensible. Nothing is gained by extending Elder's reasoning to a clearly impossible conclusion except an unnecessary reductio ad absurdum. Its reasoning does not fit in the body of Section 12.

Elder involved another issue. The conclusion reached gave a workable construction, and minimized possibly excessive emphasis on the criterion of military service. It did not hold that that phrase as used elsewhere in Section 12 possessed the identical meaning attributed to it in the proviso. The reliance placed on the legislative history as showing intent by Congress to prefer tenure over military service had bearing as to a possible contrary construction of the proviso, but was unnecessary as to the body of Section 12, which indicated no preferences. Granted that a priori one would expect a phrase repeated in a proviso not to contain an additional significance over that which it has in the body of the section, still words are not inflexible, but take color from context, and are subject to the principle of construction that Congress intends a proper and sensible enactment. A word may acquire an additional significance where its setting may include a variable.

Such is the case as to the term "competing". It refers to a relationship which may be considered as of different points of time. Suppose a tournament which proceeds through a series of contests to determine the relative ranking of contestants. At the start all who meet the qualifications for entry are "competing". After the first elimination round there arise two categories. Looking at the situation as of that time, the remaining competitors are a different and smaller group from those who were competing players at the outset. And if there is a consolations event (comparable to the problem of determining the ranking of employees of lesser tenure inter se), then in that event, too, there is another independent situation of competition between the members of that group, and the individuals may be referred to distributively by groups as "competing". The reasoning in Elder viewed the situation as it arose after the primary test of tenure had been applied.

Thereby it introduced a time -- or, more strictly, a state-of-proceedings--variable, which gave a further and additional meaning to the term "competing". This was possible, because the body of Section 12 had already prescribed a rule under which that primary test had been conducted. But it would be absurd to say that as of the start -- which is the situation covered by the body of Section 12 -- the "competing" players consist of two separate groups, before they have been thus separated.

Since the discussion in Elder concerned itself wholly with the additional significance which the term "competing" had acquired in the proviso, it is inapplicable to the body of Section 12.

3. In any case, Regs. Sec. 20.2(c) and (d) have rendered moot the Elder "definition" of the term "competing employees".

Subsequent to the decision of Elder v. Brannan, Regs. Sec. 20.2(c) and (d) have been incorporated in the regulations. 17 F.R. 11733 (Dec. 25, 1952), currently 5 CFR Sec. 20.2(c) and (d).

Regs. Sec. 20.2(c) and (d) now provide a clear, explicit and authoritative definition for the term "competing employees" as used in Section 12 of the statute. As has been shown under heading II. 4, of plaintiff's reply brief, that definition supplied by the regulations is not only consistent with plaintiff's position, but compels it. Whether or not the discussion in Elder prompted the regulations' definition of the term "competing employees", at any rate it was the proper function of the regulations to define and clarify that phrase. The validity of Regs. Sec. 20.2(c) and (d) as a correct definition of "competing employees" has not been impugned. They are clear and reasonable.

The "definitional" discussion in the Elder case did not purport to be more than an elucidation of the regulations, hence did not rise in authority above the force of the regulations. The fact that regulations have been construed by a court does not freeze them forever in the form in which they stood when considered. They may still be

clarified, improved, or even fundamentally changed by later regulation, provided, of course, that it stays within the statutory bounds. A more recent regulation supersedes an earlier one. Even if there were an inconsistency between the "definitional" concept indicated in Elder and the express definition subsequently provided by Regs. Sec. 20.2(c) and (d), the latter would control. The "definitional" discussion in the Elder case is now moot, and cannot be applied to the instant case.

4. The Elder case does not establish a principle of abnormal latitude in reduction in force regulations.

The opinion in the Elder case sustaining the aspect of the regulations which was there attacked noted (341 U.S. at 285) that the regulations "were issued by the agency which proposed the statutory language [Section 12] finally adopted". But that remark must be read in the light of the mention by the Court in the two sentences immediately before: (1) that Commissioner Flemming, by stating to the Senate Committee that the proviso "simply continues what has been in practice through the entire Federal Service since 1923", had indicated that the proviso was consistent with the primacy of tenure; and (2) that two bills proposed by veterans' organizations, and clearly inconsistent with the primacy of tenure, "were rejected in favor of * * * the language which was proposed by the Commission itself." Thus in Mr. Justice Clark's remark the reference to the Commission's draftsmanship of both proviso and regulations was tied in to the proviso's consistency with according paramount effect to the tenure criterion and to the inference that Congress had deliberately adopted that view.

The comment should therefore be taken as limited to a case where there are special circumstances, shown in the legislative history, identifying the agency's interpretation of a statute with the intent of Congress in passing it. It is, of course, Congress' intent that is relevant in determining statutory meaning. Because Congress

adopts proffered language, the draftsman does not become the oracle of interpretation.[3] By accepting proposed language, Congress does not abdicate to any agency or any lobby any portion of its legislative power. Apart from what appears publicly in legislative history, the mere coincidence that regulations are drawn by an agency which also suggested some of the statutory language must be completely irrelevant.

Nothing in the legislative history has been suggested by defendants to indicate that Congress understood the word "competing" in the body of Section 12 as necessarily limiting consideration for retention in a continuing position in a reduction in force to those employees who chance at the moment to be employed in the same pay grade. Elder v. Brannan has given the Civil Service Commission no special license to read such an interpretation into the statute.

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3 Cf. the claim, cited in Hayakawa, Language in Thought and Action (1949), page 35: "Democracy is a Greek word and Greece knows better than anyone else how to interpret it."

SUPPLEMENT C

SECTION 12, VETERANS' PREFERENCE ACT OF 1944, Act of June 27, 1944, 58 Stat. 387; 5 U.S.C.A. (Cum. Supp.) Sec. 861:

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided further, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. June 27, 1944, c. 287, Sec. 12, 58 Stat. 390, amended 1949 Reorg. Plan No. 5, eff. Aug. 19, 1949, 14 F.R. 5227, 63 Stat. 1067 [5 U.S.C.A. (cum. Supp.) Sec. 861].

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUL 18 1957

Joseph W. Stewart
CLERK

No. 13,472

OLIVER W. TOLL, *Appellant*,

v.

JOHN W. GWYNNE, ET AL., *Appellees*.

Appeal From the United States District Court for the District of Columbia

PETITION FOR REHEARING

Appellant petitions, under Rule 26 of this Court, for a rehearing with respect to the direction, contained in the last two paragraphs of the opinion rendered in this case by the Court on July 3, 1957, to the effect that (pursuant to the holding of a majority of the panel of the Court which heard the case) proceedings upon remand to the District Court be limited to the issue of appellant's statutory re-employment rights. Said holding of the majority derives

support from the second sentence of the second paragraph of the opinion, namely, "The first contention [of the appellant, viz., that he was a competing employee for positions in lower grades] seems to be foreclosed by *Hoffman* v. *Brucker*, — U.S. App. D.C. —, — F. 2d —, (decided May 23, 1957)." Appellant also seeks reconsideration of that sentence of the opinion.

The grounds of this petition include, besides contentions heretofore advanced in appellant's briefs and oral argument, the following:

I. Illegality of Section 20.5(c)

Appellant contends that Section 20.5(c) of the Civil Service Commission's reduction in force regulations, if construed as a barrier to appellant's statutory right to compete for positions for which appellant was qualified and available, is illegal as an unwarranted frustration of the rights given by Section 12 of the Veterans' Preference Act and by Section 20.2(c) and (d) of the regulations.

II. Appellant Not Foreclosed by Hoffman v. Brucker

Appellant urges that his statutory rights of competition for retention in employment are not foreclosed by the decision of this Court in the case of *Hoffman* v. *Brucker*.

A decision rendered in another case nine days after oral argument in this case seems to lack weight as *stare decisis* in this case, already submitted. In any event, the *Hoffman* case is distinguishable.[1] To demonstrate the difference between the two cases, we must analyze the respective provisions in subsections (b) and (c) of Section 20.5 of the regulations, which are involved in the two cases.

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[1] Because this point is completely new in this case, hence could not have been covered in the briefs, and also because of the intricacy of the regulations, appellant asks the Court's indulgence as to the length of the discussion of this point.

Subsection (b) applies to "employees in positions in the competitive service", and to them alone. Similarly, subsection (c) applies to "employees in positions excepted from the competitive service", and to them alone. In aggregate, subsections (b) and (c) cover all employees, whether "competitive" or "excepted"; but they do it by describing their rights separately and disjunctively. By their restriction to different classes, the provisions are mutually exclusive.

Subsection (b) has two parts, indicated by its subdivisions "1" and "2". Subdivision (1) applies to all "competitive" employees. Subdivision (2) describes the rights of "competitive" employees in Groups "I" and "II" (defined in Section 20.4 (c)(1) and (2), respectively), omitting Group III "competitive" employees (cf. Sec. 20.4(c)(3)). Thus the retention rights of "competitive" employees of Groups I and II are described in Subsection (b)(1) *and* (2); while rights of Group III competitive employees are described only in Subsection (b)(1). This arrangement of subsection (b) sets up, among "competitive" employees, a further classification, viz., between Group III competitive employees and Group I and II competitive employees.

That three-way classification—(1) "excepted" employees, (2) Group III "competitive" employees, and (3) Group I and II "competitive" employees—is the framework on which the description in Section 20.5(b) and (c) of retention rights proceeds. Against each of those three classes Section 20.5(b) and (c), if construed as limiting retention rights, has set up a barrier,—one for each category of employees. Thus:

First Barrier. Subsection (c) applies to "excepted" employees, and to them alone. By virtue of its failure to recognize for "excepted" employees the full statutory competitive rights (cf. Sec. 20.2(c) and (d)), it is construed as a barrier against competition for any position not placed in the same "level" as the employee's current position,—a barrier which applies to all employees occupying excepted positions, and to them alone.

Second Barrier. Subsection (b) applies to "competitive" employees, and to them alone. By virtue of the failure of Sec. 20.5(b)(2) to recognize for Group III "competitive" employees the full statutory competitive rights (cf. Sec. 20.2(c) and (d)),[2] subsection (b)(2) is a barrier against competition for any position not placed in the same "level" as the employee's current position,—a barrier which applies to all Group III "competitive" employees, and to them alone.[3]

Third Barrier. Subsection (b)(2) applies to Groups I and II competitive employees. The reference, in the first provision of subsection (b)(2) to "subgroup standing" (instead of "retention standing", as in its second provision, and in subsection (b)(1)) implies that in competing for any extra-level position (except one from which the Group I or II competitive employee has been promoted) a Group I or II competitive employee is restricted to half of the statutory criteria of competition.[4] This Third Barrier applies to Group I and II competitive employees, and to them alone.[5]

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[2] And contrast the greater rights recognized by Section 20.5(b)(2) for Groups I and II competitive employees.

[3] It happens that the Second Barrier (the restriction against Group III competitive employees) contains the same penalty (restriction of competition to positions in the same "level") as the First Barrier (the restriction against "excepted" employees). But these different barriers are erected by different provisions; each implied restriction is complete in itself; and each applies to a different category of employees.

[4] The Third Barrier penalty is that the Group I and II competitive employees may not assert the full statutory standard of competition ("retention standing", cf. Sec. 20.2(g)), but lose, within the field of this restriction, any advantage based on either length of service or efficiency ratings.

[5] It was unnecessary for the regulations to make the Third Barrier apply to any other category of employees than Groups I and II competitive employees, since the First Barrier and the Second Barrier, between them, had excluded all other employees from any competition whatever for any extra-level position.

The case of *Hoffman* v. *Brucker*, — U.S. App. D.C. —, — F2d —, cited in the opinion in the instant case, involved the Second Barrier, for the appellant in that case was a Group III competitive employee, who was debarred from competing for extra-level positions by virtue of the restriction implied in subsection (b)(2). The issue presented in that case was whether the Second Barrier was legal, i.e., whether the fact that a Group III competitive employee had only indefinite tenure was a reasonable basis for excluding him from competition for any extra-level positions.

In the instant case a different barrier, the First Barrier, based on subsection (c), is involved. The validity of the First Barrier depends on whether the fact that an employee holds an "excepted" position is a proper basis for excluding him from competition for any extra-level positions. This First Barrier discrimination is in the teeth of Section 2 of the Veterans' Preference Act; its illegality has been rather elaborately argued in appellant's briefs, and appellees have made little if any attempt to justify it. Appellees' tactics have been, instead, to fall back on the Second and Third Barriers, particularly the Second, which was involved in the *Hoffman* case. Rich in barriers, apparently they regarded the First Barrier as expendable.

The trouble with that argument is that, *as the regulations are drawn*, the barriers of Sec. 20.5(b) and (c), protecting the spoils system from invasion by the merit system rules of the Veterans' Preference Act, have been constructed, not in multiple, but in series. They form a line of defense divided into three segments, each segment of the line having its own barrier, much as the Roman wall might have depended along one length to a barrier against the Celts, along the next length to a barrier against the Picts, and along the third length to a barrier against the Scots. If each segment holds, the defense is complete. But if the barrier against the Celts fails, it is not enough that the barriers against the Picts and the Scots are still standing.

Appellant belongs to the tribe of "excepted" employees. Against him is only the barrier of Sec. 20.5(c), the First Barrier. On that barrier there has been no attempt of defense. Instead appellees have asked appellant to pretend he is a Pict, and kindly to go back and try to cross the Second Barrier, which, since the argument of the instant case, has now received barely timely reenforcement by the *Hoffman* decision.

If the Court applies the *Hoffman* case to the instant case, the Court would seem to be extending the Second Barrier to serve as defense in depth against "excepted" employees, against whom only the First Barrier has been constructed.[6] Such an extrapolation of the Second Barrier amounts to rewriting the regulations so as to make their provisions embrace territory which their terms do not cover. Due respect for the regulations of "the officials charged with primary responsibility in administering the act" hardly calls for reading into the regulations additional frustrations of the statute which the regulations, albeit through oversight, have failed to include.

III. Constitutional Right to Due Process of Law

Appellant contends that in the adverse adjudication in the Civil Service Commission appeal he was denied a fair hearing, in violation of his rights to due process of law under the Fifth Amendment to the United States Constitution.

In contrast to the situation in *Hoffman* v. *Brucker*, in the instant case appellant *did* "urge that the jobs [involved

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[6] Extension of the Second Barrier to restrict "excepted" employees seems to be further embarrassed by still another of the regulations' many defensive systems ("Twenty-nine distinct damnations, One sure if another fails"), namely, the restriction against statutory competition involved in Sec. 20.4(d)(2), which eliminates any competition of competitive employees for excepted positions and any competition of excepted employees for competitive positions. If competitive and excepted employees cannot even be placed in the same retention register, it seems inconsistent that a barrier against competitive employees should be available against an excepted employee.

were] interchangeable", hence appellant was entitled to a fair administrative hearing on that issue.

IV. Bogus Reduction in Force

Appellant urges that the holding of the majority of the panel "that the record discloses no basis" for appellant's claims as to the bogus character of the reduction in force is erroneous, in view of the specificity of the allegations of the pleadings and the detail of the matters presented by affidavit. If such holding is reached as a ruling of law, it fastens open the door to destruction of merit system rights through fraudulent reductions in force.

Respectfully submitted,

OLIVER W. TOLL
Appellant, *Pro Se*

Certificate

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

OLIVER W. TOLL